IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

CASE NO: 5064/2021

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED: YES/NO
5/03/25 [redacted]
DATE SIGNATURE

In the matter between:

ABSA BANK LIMITED	Applicant

and

DANIEL THEMBA MABUNDA N.O. IN HIS CAPACITY AS TRUSTEE OF MBUNDA FAMILY TRUST	First Respondent
MBUSO GODFREY N.O. IN HIS CAPACITY AS TRUSTEE OF MBUNDA FAMILY TRUST	Second Respondent
ANNA NGOMANE N.O. IN HER CAPACITY AS TRUSTEE OF MBUNDA FAMILY TRUST	Third Respondent

MBUSO GODFREY MABUNDA	Fourth Respondent
DANIEL THEMBA MABUNDA	Fifth Respondent

JUDGMENT

Managa AJ

[1] This is an application for default judgment for payment of the sum of R305 678.24 and an order in terms of Rule 46(1)(a)(ii) and 46A of the Uniform Rules of Court.

[2] On or about 2 July 2006, the applicant ("the bank") and the respondents (in their capacity as trustees of the Trust) concluded a written mortgage loan agreement ("agreement"). In terms of the agreement, the bank agreed to advance the sum of R570 000.00 to the respondents as a home loan.

[3] There is no dispute between the parties regarding the existence of the agreement.

[4] As security for indebtedness arising from the agreement, the Trust caused the mortgage to be registered over the immovable property it owns, in favour of the bank. With regard to the security for the indebtedness, the fourth and fifth respondents bound themselves respectively as sureties and co-principal debtors for the indebtedness due on part of the Trust.

[5] The Trust defaulted with its obligation in terms of the agreement in that it failed to effect full and punctual payment of the monthly instalment due in terms of the agreement.

[6] The bank decided to issue summons against the Trust. At the time when the summons was issued, the arrears on the relevant account was R305 678.24.

[7] The respondents filed a notice of intention to defend. The respondents failed to file a plea within the period provided in the rules of this court. The bank served

and filed a notice of bar. Again, the respondents failed to file a plea within the period provided in the notice of bar.

[8] The bank correctly proceeded to launch an application for default judgment. The respondents served and filed a notice of opposition to the application and the answering affidavit respectively.

[9] I must indicate that I find it strange that the respondents saw a need to oppose the application for default judgment and never bother themselves to bring an application in terms of Rule 27 to uplift the notice of bar. I will deal with the argument raised in this regard in the later paragraphs.

The relief sought in terms of Rule 46(1)(a)(ii) and 46A

[10] In relation to the relief sought in terms of Rule 46(1)(a)(ii) and 46A (which relief is also unopposed before this Honourable Court), it is important to deal with the legal principle that underpins the relief sought before I make a finding on it.

[11] Rule 46A deals with the execution of judgment debts against immovable property. The rule was amended, together with Rule 45, against the backdrop of the judgments of the Constitutional Court[1] and the Supreme Court of Appeal,[2] on the need for judicial oversight of execution of the judgment debts against immovable property.

[12] Rule 46A(2)(a) to (c) states the following:

> "(a) A court considering an application under this rule must—
>
> (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
>
> (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

[1] *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC).

[2] *Standard Bank of South Africa Limited v Saunderson and Others* 2006 (2) SA 264 (SCA).

(a) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(b) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property."

[13] The requirement for judicial oversight is clearly intended to ensure compliance with the substantive provisions of Rule 26 of the Constitution. In the decision of *Gundwana v Steko Development and Others*[3] it was, *inter alia,* stated that:

"To agree to a mortgage bond does not, without more, entail agreeing to forfeit one's protection under section 26(1) and (3) of the Constitution."

[14] Furthermore, the Court echoed in referred to *Jaftha*'s case that:[4]

"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 manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure." (My emphasis.)

[15] Froneman J further held in *Gundwana* that:[5]

"It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economical 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 the alarm bells should start ringing. If there are no other proportionate means to achieve the same end, execution may not be avoided."

[16] Subsequent to the above, the full bench of the Gauteng Division of the High Court (being the predecessor of this Honourable Court) in the matter of *FirstRand Bank Limited v Folscher and Another, And Similar Matters*,[6] set out the factors which need to be considered by a court when declaring an immovable property specially

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[3] *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) para 46.
[4] Ibid para 47.
[5] Ibid para 54.
[6] *FirstRand Bank Ltd v Folscher and Another, And Similar Matters* 2011 (4) SA 314 (GNP).

executable. Those principles will not be rehearsed presently,[7] as the legal basis was not disputed by the Trust or respondents. It was, *inter alia,* found in the *Folscher* matter that:

> "If a creditor's claim is opposed, the debtor will ordinarily be in the best position to advance any contentions he may wish to make and will be able fully to inform the court of any aspect that should be taken into account."[8]

[17] The bank therefore made the following submissions:

17.1 The respondents were clearly aware of the process against them, having entered both a notice of intention to defend initially and subsequently having entered a notice of intention to oppose;

17.2 The property is registered in the name of a Trust and therefore should, strictly speaking, not be able to serve as a primary residence. Additionally, it is evident that the valuation report indicates that the encumbered property is "… *a vacant stand situated in a secure development*".[9] Ostensibly the fourth and fifth respondents reside elsewhere. All of these factors indicate that the encumbered property is *not* a primary residence;

[18] There is no substantive opposition to the application in terms of rule 46. I was not provided with any counter reasons why I should not declare the property executable in terms of rule 46. On the other hand, the bank has provided sufficient reasons for the order sought.

The respondent is barred from serving and filing a plea

[19] It is important to note that the respondents are barred from pleading to the particulars of claim, and they are yet to launch an application in terms of Rule 27 to uplift the bar. The respondents had more than enough opportunity to launch the application to uplift the bar and failed to do so. It is not clear from the papers why such an application was not launched.

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[7] Ibid para 41.
[8] Ibid para 42.
[9] Vide: Annexure "JAS2", p 110.

[20] I raised this question with the respondents' counsel, Mr Mojadibofu, and he incorrectly indicated that the court has powers to uplift the bar without substantive application by the respondents. This argument has no merit because Rule 27 indicates that the application must be on *notice and on good cause shown.* This clearly suggests that it must be a substantive application which affords the other party an opportunity to consider it and file an answering affidavit.

[21] In the absence of the order uplifting the bar, the application for default judgment remains unopposed and therefore the bank is entitled to the relief sought in terms of notice of motion.

[22] In the circumstances, the application for default judgment is considered unopposed and the bank has established sufficient grounds for the relief sought.

The defence raised by the respondents in their answering affidavit

[23] Apart from the fact that the respondents are barred, there is no justifiable defence raised. First, Mr. Mojadibofu argued that the parties should have mediated the dispute. There is no indication in the papers that parties have ever agreed to mediate the dispute save for the discussion which does amount to an agreement. In any event, the bank made its intention clear that it intends to proceed with the application. Therefore, there is no merit in the argument.

[24] Second, the debt is paid. I was referred to annexure to "MFT1", which indicates zero balance. I asked Mr Mojadibofu to direct me to the proof of payments which indicate that the debt has been paid in full. He failed to direct me to such documents. The explanation tendered by the bank, with regard to annexure "MFT1", is that the zero balance is *due to the fact that Applicant's system operates in a manner that for internal use and account management purposes, aged accounts are moved to an "off balance space".*[10] This however does not mean that the respondents are not indebted to the bank.

[25] I have no reason not to believe the explanation tendered by the bank. It is incumbent on the respondents to furnish me with the proof of payment. This principle

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[10] Consolidated index bundle, p 199.

is set out in the judgment of *Pillay v Krishna*,[11] wherein the court indicated the following:

> "It may be true that, even in the case of a promissory note, a plaintiff must initially allege that the debt remains unpaid. Not only do the majority of the forms (though not all) given by Bullen and Leake, *Precedents of Pleading* (8th ed., pp. 133 *et seq.*) make the allegation, but on page 115 the learned authors state specifically: *"The fact that the bill is unpaid, or that the amount claimed is due, should be shown in the body of the Statement of Claim or in the particulars." Yet, however that may be, it is clear law that, when the defendant denies this allegation and pleads payment, the onus of proving payment at the close of the pleadings is on him. (And it is with the position as it stood at the close of the pleadings that we must deal.) The reason, I think, is to be found in the third general rule, which I set out earlier in the judgment, that a person is not usually required to prove a negative. If A claims from B an amount of money which is admitted to have been due originally, and if B alleges that he has paid it, it is as a rule extremely difficult for A, save by his own evidence, to establish the fact of non- payment. On the other hand, B could have demanded a receipt when he paid, the efficacy of which, certainly in the Roman Dutch Law, was exceptionally great.* (My emphasis.)

[26] Third, Mr Mojadibofu did not pursue the balance of the argument raised in the answering affidavit.

[27] I therefore find that the bank has made out a case for the relief sought.

Order

[28] In the result, I grant the following order:

1 Payment of the sum of R305 678.24 (three hundred and five thousand, six hundred and seventy-eight rand and twenty-four cents).

2 The following immovable property is specially declared executable:

(a) Portion 581 (a portion of portion 238) of the Farm White River 64, Registration Division J.U., Province of Mpumalanga in

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[11] *Pillay v Krishna* 1946 AD 946 at 955.

extent: 9423 (nine thousand four hundred and twenty-three square metres) held by deed of transfer t159337/06 subject to all the terms and conditions contained therein and subject to the reservation of mineral rights (hereinafter "the immovable property").

3 That the Registrar of the above Honourable Court be authorised to issue a writ of execution in respect of the immovable property referred to above, in order to give effect to the order granted in terms of prayer 3 above.

4 A directive in terms of Rule 46A(8) of the Uniform Rules of Court in terms of the Supreme Court Act 59 of 1959 and specifically whether the court deems it fit to set a reserve price, the amount to be set is R800 000.00.

5 Cost of suit on scale C.

[redacted]

P MANAGA

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

Appearances

For the Applicant:	Adv J Eastes
instructed by:	Delberg Incorporated
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For the Respondents:	R Rothlisberger
Appearance by:	Adv T Mojadibofu
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