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

Case No: 27243/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 2/7/2025

SIGNATURE

In the application between:-

NEDBANK LIMITED

Applicant/Plaintiff

[Registration No: 1951/00009/06]

and

CORNELIA NTSHABILE LEKALA N.O.

First Respondent/Defendant

[Identity No: 7[...]]

(In her capacity as duly appointed *executrix* in
the estate of the late Michael Morwantupi Lekala)

THE MASTER OF THE HIGH COURT

POLOKWANE

(Administration of Deceased Estates Department –

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment shall be deemed to be 2 July 2025.

JUDGMENT

LG KILMARTIN, AJ:

A. INTRODUCTION:

[1] This is an opposed application for summary judgment against the first respondent, Cornelia Ntshabile Lekala N.O., in her capacity as the duly appointed *executrix* in the estate of the late Michael Marwantupi Lekala ("the deceased") for, *inter alia*, the payment of the sum of R649 981.06, together with interest thereon at a rate of 9.65% per annum, calculated daily and compounded monthly in arrears from 22 February 2022 to date of payment, and an order declaring the immovable property bonded in favour of the applicant, Nedbank Limited, by the deceased to be specially executable, together with costs on an attorney and client scale.

B. RELEVANT BACKGROUND FACTS:

[2] The first respondent was the wife of the deceased and, following the death of the deceased on 19 February 2020, she was appointed the *executrix* of the deceased's estate on 9 November 2021.

[3] The debt arises from a written Home Loan Agreement ("the Loan Agreement"), concluded between the applicant, duly represented, and the deceased, read together with a written Mortgage Bond registered over the immovable property in favour of the applicant ("the Mortgage Bond").

[4] The relevant terms of the Loan Agreement and Mortgage Bond are recorded in the particulars of claim and, although the first respondent claimed to have no knowledge of the Loan Agreement and Mortgage Bond, she does not deny that they were concluded.

[5] The first respondent failed and/or refused and/or neglected to pay the monthly instalments due to the applicant in breach of the Loan Agreement, *alternatively*, to settle the applicant's claim as required in terms of the Administration of Estates Act, 66 of 1965 ("the Administration of Estates Act"), further *alternatively*, the first respondent failed and/or refused to realise the immovable property and, hence, the estate of the deceased is indebted to the applicant.

[6] The applicant claims that it is, under the circumstances, entitled to payment of the full outstanding balance that is due and owing and an order declaring the immovable property specially executable in terms of the Loan Agreement and/or the Mortgage Bond.

[7] A section 129(1)(a) notice in terms of the National Credit Act, 34 of 2005 ("the National Credit Act") appears to have been dispatched to the first respondent's last known address, namely, Stand No. 1[...], Leeuwfontein.

[8] Following the service of the summons, the first respondent served a notice of intention to defend on 6 June 2022. After delivery of a notice of bar dated 11 July 2022, the first respondent delivered a plea on 12 July 2022.

[9] In essence, the first respondent raised the following defences:

- [9.1] a special plea of non-compliance with the provisions of section 129 of the National Credit Act;
- [9.2] the applicant's claim is "*premature*" as she did not know of the existence of the conclusion of the Loan Agreement and Mortgage Bond;
- [9.3] the first respondent had not been placed in *mora* by the applicant and that the applicant approached the above Honourable Court in bad faith; and

[9.4] the first respondent further alleges there is an alleged ongoing dispute surrounding her appointment and the deceased's frozen bank accounts have prevented her from settling any outstanding amounts due and owing to creditors. In this regard, the first respondent alleges in her plea that the value of the deceased estate is "*north of two million*".

[10] Before dealing with the merits of the matter, I wish to deal with the relevant legal provisions and authorities.

C. RELEVANT LEGAL PROVISIONS AND AUTHORITIES:

(a) Summary judgment:

[11] Rule 32 deals with "*Summary judgment*" and provides, *inter alia*, as follows:

- "(1) *The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only —*
- (a) on a liquid document;*
 - (b) for a liquidated amount in money;*
 - (c) for delivery of specified movable property; or*
 - (d) for ejectment;*
- together with any claim for interest and costs.*
- (2) (a) *Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.*
- (b) *The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial."*

[12] Summary judgment is only to be granted where the plaintiff can establish its claim clearly and the defendant fails to set up a *bona fide* defence.¹

[13] As was stated by the full court in *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another*:²

“The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution.”

(b) Rules 46 and 46A:

[14] Rule 46(1) provides, *inter alia*, as follows:

“(1)(a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless —

- (i) ...*
- (ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).”*

[15] Rule 46A provides as follows:

“46A Execution against residential immovable property

- (1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.*
- (2) (a) A court considering an application under this rule must —*

¹ *Erasmus Superior Court Practice*, RS 17, 2021, D1- 383.

² 2020 (1) SA 623 (GJ), para [16].

- (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.*
 - (b) *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.*
 - (c) *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.*
- (3) *Every notice of application to declare residential immovable property executable shall be —*
- (a) *substantially in accordance with Form 2A of Schedule 1;*
 - (b) *on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;*
 - (c) *supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and*
 - (d) *served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.*
- ...
- (5) *Every application shall be supported by the following documents, where applicable, evidencing:*
- (a) *the market value of the immovable property;*
 - (b) *the local authority valuation of the immovable property;*
 - (c) *the amounts owing on mortgage bonds registered over the immovable property;*
 - (d) *the amount owing to the local authority as rates and other dues;*

- (e) *the amounts owing to a body corporate as levies; and*
- (f) *any other factor which may be necessary to enable the court to give effect to subrule (8):*

Provided that the court may call for any other document which it considers necessary.

...

- (8) *A court considering an application under this rule may —*
 - (a) *of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;*
 - (b) *order the furnishing by —*
 - (i) *a municipality of rates due to it by the judgment debtor;*
or
 - (ii) *a body corporate of levies due to it by the judgment debtor;*
 - (c) *on good cause shown, condone —*
 - (i) *failure to provide any document referred to in subrule (5);*
or
 - (ii) *delivery of an affidavit outside the period prescribed in subrule (6)(d);*
 - (d) *order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;*
 - (e) *set a reserve price;*
 - (f) *postpone the application on such terms as it may consider appropriate;*
 - (g) *refuse the application if it has no merit;*
 - (h) *make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or*
 - (i) *make any other appropriate order.*
- (9) (a) *In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.*

- (b) *In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account—*
- (i) *the market value of the immovable property;*
 - (ii) *the amounts owing as rates or levies;*
 - (iii) *the amounts owing on registered mortgage bonds;*
 - (iv) *any equity which may be realised between the reserve price and the market value of the property;*
 - (v) *reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);*
 - (vi) *whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;*
 - (vii) *the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;*
 - (viii) *any prejudice which any party may suffer if the reserve price is not achieved; and*
 - (ix) *any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor."*

(c) **Section 129 notice:**

[16] Section 129 of the National Credit Act reads as follows:

"129 Required procedures before debt enforcement

- (1) *If the consumer is in default under a credit agreement, the credit provider-*
- (a) *may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve*

- any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and*
- (b) *subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-*
- (i) *first providing notice to the consumer, as contemplated in paragraph (a), or in section 86 (10), as the case may be; and*
- (ii) *meeting any further requirements set out in section 130.*
- ...
- (5) *The notice contemplated in subsection (1)(a) must be delivered to the consumer-*
- (a) *by registered mail; or*
- (b) *to an adult person at the location designated by the consumer.”*
- ...
- (7) *Proof of delivery contemplated in subsection (5) is satisfied by-*
- (a) *written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or*
- (b) *the signature or identifying mark of the recipient contemplated in subsection (5) (b).”*

[17] In *Kubyana v Standard Bank of South Africa Limited*³ (“Kubyana”) it was confirmed that a credit provider must at least establish that the section 129 notice was delivered by registered post to the post office that would send a delivery notice to the consumer. The Constitutional Court stated the following in this regard:⁴

“[54] The Act prescribes obligations that credit providers must discharge in order to bring s 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that —

- (a) *the s 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from*

³ 2014 (3) SA 56 (CC), para [54].

⁴ *Kubyana*, para [54].

- a track and trace report and the terms of the relevant credit agreement;*
- (b) the Post Office issued a notification to the consumer that a registered item was available for her collection;*
 - (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the F consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and*
 - (d) a reasonable consumer would have collected the s 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a) – (c), which inference may, again, be rebutted by a G contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.”*

(d) Sections of the Administration of Estates Act:

[18] Section 29 of the Administration of Estates Act provides as follows:

“29 Notice by executors to lodge claims

- (1) Every executor shall, as soon as may be after letters of executorship have been granted to him, cause a notice to be published in the Gazette and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, or if he was not ordinarily so resident in any district in the Republic, in one or more newspapers circulating in a district where the deceased owned property, calling upon all persons having claims against his estate to lodge such claims with the executor within such period (not being less than thirty days or more than three months) from the date of the latest publication of the notice as may be specified therein.*

- (2) *All claims which would be capable of proof in case of the insolvency of the estate may be lodged under subsection (1)."*

[19] Section 30 of the Administration of Estates Act reads as follows:

"30 Restriction on sale in execution of property in deceased estates

No person charged with the execution of any writ or other process shall-

- (a) *before the expiry of the period specified in the notice referred to in section twenty-nine; or*
- (b) *thereafter, unless, in the case of property of a value not exceeding R5 000, the Master or, in the case of any other property, the Court otherwise directs, sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person."*

[20] Section 34 of the Administration of Estates Act reads as follows:

"34 Insolvent deceased estates

- (1) *On the expiry of the period specified in the notice referred to in section 29 the executor shall satisfy himself as to the solvency of the estate and, if the estate is found to be insolvent then or any time before distribution under subsection (12) of section 35, he shall forthwith by notice in writing (a copy of which he shall lodge with the Master) report the position of the estate to the creditors, informing them that unless the majority in number and value of all the creditors instruct him in writing within a period specified in the notice (not being less than fourteen days) to surrender the estate under the Insolvency Act, 1936 (Act 24 of 1936), he will proceed to realize the assets in the estate in accordance with the provisions of subsection (2): Provided that-*
 - (a) *no creditor whose claim amounts to less than R1 000 shall be reckoned in number;*

- (b) *any creditor holding any security which a trustee would under section 83 of the said Act have been authorized to take over if the estate had been sequestrated, shall, if called upon to do so in writing by the executor, place a value thereon within the period specified by the executor, and shall be reckoned in respect of the balance of his claim which is, according to such valuation, unsecured; and*
- (c) *if any creditor fails to place a value on any such security within the said period, he shall not be reckoned as a creditor for the purpose of this subsection.*

[21] Section 35 of the Administration of Estates Act provides that:

“35 Liquidation and distribution accounts

- (1) *An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within-*
 - (a) *six months after letters of executorship have been granted to him; or*
 - (b) *such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.”*

D. DISCUSSION OF THE MERITS OF THE APPLICATION:

[22] In prayer 7 of the notice of application for summary judgment, it was requested that it be declared that the property be sold without a reserve price. However, the Court is of the view that it is necessary in this instance to set a reserve price as the property is clearly zoned for residential purposes and it is unclear, based on the pleadings as currently formulated, whether it is being occupied as a primary residence. The first respondent merely refers to the fact that there are minor children who were left behind. No doubt conscious of this, *alternative* relief in this regard was provided for in prayers 7.1 and 7.2 of the notice of application for summary judgment.

[23] During argument it was raised that there was no sworn valuation in respect of the property and, accordingly, it was not possible for the Court to determine a reserve price in the matter. In this regard, the only document before the Court is an outdated Lightstone Erf valuation which is dated 23 February 2022 (i.e. over two years ago) and a rates and taxes bill dated 8 July 2022.

[24] *In SB Guarantee Company (Pty) Ltd v De Sousa; SB Guarantee Company (Pty) Ltd v Scott and Another; and The Standard Bank of South Africa Ltd v Ferris*,⁵ it was confirmed that valuations in matters of this nature must be confirmed under oath and that the person providing an expert valuation must set out clearly, on affidavit, the source of their knowledge of the facts related to their involvement in the valuation and basis upon which they claimed expertise. Furthermore, it was confirmed that the valuations should, in the absence of other evidence which may satisfy the Court as to the expertise of that person who had determined the value, be those of accredited professional valuers registered in terms of the Property Valuers Profession Act, 47 of 2000.⁶

[25] In the light of the fact that no reserve price could be determined by the Court based on the evidence before it, counsel for the applicant requested an order in the following terms:

“Summary judgment is hereby granted against the First Defendant, as follows:

- 1. Payment in the amount of R649 981.06.*
- 2. Payment of interest on the amount of R649 981.06 at the rate of 9.65% per annum, calculated daily and compounded monthly in arrears from 22 February 2022 to date of payment, both dates inclusive.*
- 3. An order declaring:*

ERF 1[...] NELLMAPIUS EXTENSION 19

***TOWNSHIP REGISTRATION J.R., THE PROVINCE OF GAUTENG
MEASURING 252 (TWO HUNDRED AND FIFTY TWO) SQUARE
METERS***

HELD BY DEED OF TRANSFER NUMBER T16/21643,

⁵ *SB Guarantee Company (Pty) Ltd v De Sousa and 2 similar cases* (“SB Guarantee”) 2024 (6) SA 625 (GJ), paras [79] and [85].

⁶ *SB Guarantee* at paras [83] to [84].

***SUBJECT TO THE TERMS AND CONDITIONS THEREIN CONTAINED,
specially executable
("the Property")***

4. *An order authorising the issuing of a writ of execution by the Registrar in terms of rule 46 as read with rule 46A of the Uniform Rules of Court, for the attachment of the Property.*
5. *It is declared that, in terms of section 30(b) of the Administration of Estates Act 66 of 1965, the Property may be sold.*
6. *Costs of suit on the attorney and client scale.*
7. *The Plaintiff may approach the above Honourable Court in due course for leave for the Sheriff to execute the warrant of execution and for an order for the determination of a reserve price for the sale of the property at a sale in execution."*

[26] I am not inclined to deal with this matter piecemeal as was suggested and am not satisfied that a clear case has been made out by the applicant which is what is required to be granted summary judgment.

[27] In particular, I am not satisfied that there is proper evidence before this Court as envisaged in Rule 46A(5)(a) and such evidence is vital in matters of this nature.

[28] In paragraph 12 of the plea, it was also raised that there was no "*physical evaluation*" of the property.

[29] Reference is also made to the first defendant having given notice to creditors of the deceased estate but only an extract from the Government Gazette is attached and it is unclear whether she published the additional notice referred to in section 29 of the Administration of Estates Act and, if so, when the 30-day period in such notice expired. There are also no averments to this effect in the particulars of claim.

ORDER

In the circumstances, I make the following order:

1. The summary judgment application is postponed *sine die*;
2. The applicant is granted leave to supplement its papers and to provide admissible and updated evidence to enable the Court to determine the reserve price if it is inclined to grant summary judgment; and
3. Costs of the hearing on 17 March 2025 will be costs in the cause and the scale thereof will be determined by the Court ultimately hearing the summary judgment application.

LG KILMARTIN
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Dates of hearing: 17 March 2025

Date of judgment: 2 July 2025

For the Applicant: SG Webster

Instructed by: Van Rensburg Incorporated.

Attorneys for First Defendant Mnguni Attorneys