

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

Case No.: 2022/002174

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
24 July 2025

In the matter between:

NEDBANK LIMITED

Applicant

and

BONFACE TINTIN NDAWALA

First Respondent

City of Johannesburg

Second Respondent

ERF 1[...] SUNNINGHILL EXTENSION 91

HOMEOWNERS ASSOCIATION

Third Respondent

Date Heard: 04 June 2024

REASONS FOR JUDGMENT

Bhengu AJ

Introduction

[1] This matter came before me on 04 June 2024. It was an opposed application for money judgment against the first respondent as well as an order declaring the First Respondent's property described as Portion 8 of Erf 1[...] Sunninghill Extension 91 Township, Registration Division I.R., Province of Gauteng ("the Property"), especially executable in terms of Rule 46A.

[2] The first respondent, Mr Ndawala, appeared in person, his attorney having withdrawn as attorney of record a few hours before the hearing. I considered that the matter was previously postponed at the instance of Mr Ndawala and that he had failed to comply with the previous court order relating to when he should file his answering affidavit. All the opposing papers have since been filed, and as a result therefore I proceeded to hear the matter.

[3] After having heard the parties, I granted judgment in favour of the applicant for the payment of R2,614,418.41 (Two Million Six Hundred and Fourteen Thousand, Four Hundred and Eighteen Thousand, Forty-One Cents). I also granted an order declaring the immovable property especially executable with a reserve price set in the sum of R2,200,000.00.

[4] The operation of the order was suspended for 6 months in order to allow Mr Ndawala to bring his arrears up to date.

[5] In July 2025, I received a request for written reasons for judgment from the applicant, citing reasons that Mr Ndawala served an application for leave to appeal the judgment. It is for this reason that I'm providing the reasons a year after the order was granted. To provide context, I will start with the background of the matter.

Background

[6] Mr Ndawala is an accountant and the CEO of a mobile operator in his home country in Malawi. He is the registered owner of the property. The property is his primary residence.

[7] The immovable property was purchased on 16 October 2011. To secure the purchase price, Mr Ndawala entered into a home loan agreement with the applicant. As security for the monies lent and advanced to him under the loan agreement, a covering mortgage bond in the amount of R2,400,000.00 was registered in favour of the applicant.

[8] It is common cause that Mr Ndawala defaulted on his home loan repayments. The last payment, according to him, was sometime in 2021. He has not been able to make any further payments or alternatively to make payment arrangements to date.

Statutory compliance with the National Credit Act

[9] The initial notice in terms of section 129(1) of the National Credit Act 34 of 2005 ("the NCA") to the First Respondent was dispatched on 11 January 2022 via registered mail and by the Sheriff as per the Sheriff's return of service. A further demand was dispatched on 24 February 2022.

[10] According to a Chapter 10.17 affidavit deposed to by the applicant's attorney of record and a certificate of balance dated 12 June 2023, the balance outstanding on the home loan as of 31 May 2023 was R2,883,647.76

[11] Last payment was made on 31 August 2021 in the sum of R20,221.14.

[12] The arrears on the account had increased to R977,923.49.

[13] The monthly instalments to service the loan are R27,559.62.

The legal framework

[14] Section 26 of the Constitution provides that everyone has the right to have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

[15] It is common cause that the immovable property against which the Respondent intends to execute is the primary residence of Mr Ndawala.

[16] Uniform Rule 46A provides the following regarding execution against immovable property which is a primary residence:

(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—*

(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.

[17] [16] Before authorising foreclosure on a debtor's primary residence, a court must exercise its judicial oversight to ensure it is proportionate. In *Gundwana v Steko Development CC*¹ the Constitutional Court held that:

¹ *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC), para 54

“It must be accepted that execution in itself is not an odious thing. 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”.

[18] It is therefore important for the court to consider whether there is any reasonable possibility that Mr Ndawala may be able to satisfy his indebtedness in any other way to retain ownership of his home.

Shares

[19] Mr Ndawala’s averred that he owned 5,400 shares of R1000 each held at Midveldt Investments (Pty) Ltd, which could be attached and sold to satisfy his indebtedness. The applicant correctly argued that Mr Ndawala failed to attach an evaluation certificate from an actuary or other accountant to confirm the value of those shares. Considering that his indebtedness spans from 2021, I am of the view that Mr Ndawala should have at least taken steps to sell his shares to cover his indebtedness, if indeed they are worth that much. It is unreasonable for Mr Ndawala to expect the creditor to undertake the exercise of verifying the existence of the shares when he cannot do it himself, despite such information falling within his personal knowledge.

Possible funds from the mobile operator business in Malawi

[20] Mr Ndawala stated that as the CEO of a mobile operator in Malawi, one of his responsibilities under that contract is to get funding from investors. He was in the process of finalising an agreement with a potential investor where he could raise over R200 million, in which case he would be able to pay the arrears in one go. Mr Ndawala complained that because he is not represented, he was unable to bring proof of the contract and license of the business that he is referring to. I am, however, of the view that Mr Ndawala’s complaints have no merit in that he has always been legally represented throughout these proceedings up until a few hours

before the hearing. In his answering affidavit that was filed in August 2023, he only attached a share certificate. No proof of his current earnings or the licenses for the mobile operator that he is referring to was made available. The matter was set down to proceed on the date of the hearing. Filing of further pleadings had already closed. Therefore, the allegation of not being allowed to present this documentation during the hearing is misplaced.

Other defences raised in the answering affidavit

[21] Mr Ndawala raised four defences in his answering affidavit. He first denied his indebtedness under the home loan, he challenged the interest charges citing that it was exorbitant, that the bank failed to assess his financial position at the time of granting the loan, amounting to reckless lending and he also challenged the costs claimed on an attorney-client scale.

[22] I am of the view that his denial of indebtedness is contrary to his admission under oath that he owed the applicant and that his last payment towards the bond was in 2021. Further his allegation of reckless credit is countered by the fact that at the time he applied for the bond, he was employed by Cell C as a Finance Executive earning R209,000,00 cost to company. His evidence during the hearing was that when he still had a job, he never defaulted on his bond repayments. His defence of reckless credit should therefore fail.

[23] His challenge of the interest charged on the account and the attorney and client scale of costs are provided for in the agreement that he signed willingly. There is no explanation from Mr Ndawala why he agreed to these terms of the loan, only to challenge them almost 13 years later when he is having financial difficulties. It is trite that contracting parties cannot escape the enforcement of contractual terms on the basis that enforcement would be disproportionate or unfair in the circumstances.²

Conclusion

² Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13

[24] Taking into account the following factors: (i) that the indebtedness of Mr Ndawala under the home loan is over R2,6 million, (ii) that his last payment was in August 2021 and the arrears had escalated to R977,923.49 and are still increasing, (iii) that his efforts to raise funds has failed to yield any results for a period of close to three years, and (iv) that there is no proof of any movable property that can be sold to satisfy his indebtedness, I conclude that having regard to all these facts it was appropriate to grant an order, inter alia, declaring the immovable property specially executable in terms of the provisions of Rule 46A of the Act. I am of the view that foreclosure will also assist Mr Ndawala to alleviate the escalating indebtedness not only on the home loan but also towards other creditors like the municipality and the homeowner's association.

Suspension of the operation of the order

[25] Taking into account Mr Ndawala's averment that he is close to finalising a deal that might see him possibly settling all his indebtedness at one go, I decided to grant him the benefit of the doubt by suspending the operation of the order for 6 months in order to give him a fair chance to bring his arrears up to date.

Reserve Price

[26] The market value of the property as per a sworn valuation certificate compiled by an independent valuator, Mr Herschel of CPF valuers, dated 10 May 2023, is R2,850,000.00, and the forced sale value is R2,200,000.00.

[27] The municipal valuation is R2,697,000.00.

[28] According to a statement from the local authority dated 12 May 2023, the amount owed to the local authority was R25,324.24.

[29] The amount owing to the Sunninghill Broke Estate Homeowners Association as per statement dated 08 June 2023 was R45,804.59.

[30] The applicant proposed a reserve price of R2,200,000.00, which I agreed was a fair amount considering the amounts outstanding to the local authority and to the Homeowners Association. Mr Ndawala contended that the value of the property is worth well over R5,000,000.00. According to Mr Ndawala, a reserve price of R2,200,000.00 is too low. He submitted that a reserve price of R4,000,000.00 is reasonable. I am of the view that this contention has no basis. Both the independent valuation by Mr Herschel and the municipal valuation places the property under R3,000,000.00. This objection to the valuation to the reserve price was made in August 2023 in his answering affidavit. There is no alternative independent valuation that Mr Ndawala is relying on. This contention, therefore, falls to be rejected.

[31] In the result, I granted the order dated 04 June 2024.

JL BHENGU
ACTING JUDGE OF HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicant: Adv L Peter
Instructed by: Lownders Dlamini Attorneys

For the First Respondent: Mr Ndawala - in person

Date: 24 July 2025