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

Case No: 2022-013887

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

8 October 2025

IN THE MATTER BETWEEN:

NEDBANK

APPLICANT

AND

MANDLA-KAYISE EMMANUEL MAVUSO

DEFENDANT

JUDGMENT

This Judgment is handed down electronically by circulation to the Applicant's Legal Representative and the Respondents by email, publication on Case Lines. The date for the handing down is deemed 8 October 2025 at 10h00.

NAIR AJ

INTRODUCTION:

[1] This is an application brought in terms of Rule 46A of the Uniform Rules of the High Court (the “Uniform Rules of Court”) for an order declaring executable the respondent’s immovable property, situated at [...] K[...] Street, Erf 1[...] Elspark Extension 1, Gauteng (the “Property”) which constitutes his primary residence.¹ The applicant, Nedbank Limited (the “Bank”), also seeks default judgment in the amount of R1 054 746.50, 00 together with interest and costs on the attorney-and-client scale.²

[2] The respondent appeared in person. This court was therefore careful to ensure that he was not prejudiced by his lack of legal representation, and that judicial guidance was exercised consistent with the principle in *Standard Bank of South Africa Ltd versus Snyders and Another*³. The court in this matter set out the need for guiding lay litigants with regards to the applicability of section 26⁴ of the Constitution of the Republic of South Africa Act 108 of 1996 (the “Constitution”) in matters involving the execution of their primary residence. The court further emphasised that section 26 of the Constitution and its applicability should be pleaded in a plaintiff’s particulars of claim (the “POC”) so that the defendant can be aware of the applicability of section 26 of the Constitution and the protection that a defendant enjoys in terms thereof. In the present case the bank in its combined summons contained the necessary

¹ Rule 46A(1) of the Uniform Rules of Court

² Caselines 009-1 – 009-6 - Founding Affidavit prayers

³ *Standard Bank of South Africa Ltd versus Snyders and Another* 2015 (5) SA 610 (WCC) para 24

⁴ “Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

allegation to the effect that the respondent's attention was drawn to the applicability of section 26 of the Constitution but that the facts alleged by the bank are sufficient to justify an order in terms of section 26(3) of the Constitution.⁵

FACTUAL BACKGROUND:

- [3] The relevant history is drawn from the papers filed on record by the parties. On 9 November 2006, the respondent concluded a loan agreement and mortgage bond with the applicant in the amount of R 805 000, 00 secured over the property.⁶ He was 52 years old at the time and although married in community of property to his wife was the only one who signed the agreement. The bond was registered under Title Deed No B[...]. The loan was repayable in monthly instalments of R7 515,00 over a period of 360 months and included an attorney-and-client costs clause in the event of default.⁷ The respondents wife, Mrs Charmaine Mavuso, consented to the loan agreement and mortgage bond entered into between the respondent and the bank and this consent was attached to the signed loan agreement.⁸
- [4] The loan agreement and mortgage bond facility was restructured twice, in 2016 and 2019, to assist the respondent following financial distress.⁹ The capital amount loaned in respect of the 2016 restructure was R963 233,50 and together with interest and costs was R1 721 183,90 over a period of 252 months with a repayment of R8 520, 58 per month. In 2019 the capital

⁵ Caselines 004-5 to 004-6

⁶ Caselines 004-16 – 004-32 - Mortgage Bond and Title Deed

⁷ Caselines 004-9 para 5 of founding affidavit

⁸ Caselines 004 - 26

⁹ Caselines 004-33 – 004-47 - Restructure Agreements 2016 and 2019

amount loaned was R1 066 103,14 with a total cost of the credit agreement being R2 399 713, 74 over a period of 207 months and a monthly repayment of R11 592, 82 per month.¹⁰ These capital amounts were increased to include the amounts used to settle the debt due and owing to the bank in respect of the initial loan agreement pertaining to the property. The 2019 restructure incorporated an amended repayment term extending to 2037.¹¹

[5] Despite the abovementioned indulgences, the respondent again fell into arrears. By 21 July 2023, the arrears totaled R 174 348.94 and the outstanding balance was R 1 140 995.05.¹² The last payment of R 11 863.02 was made on 23 December 2022.¹³ A supplementary affidavit was filed on behalf of the bank indicating the arrears on the bond account as at 5 September 2023 was R201 627, 44.¹⁴ The respondent having failed to make payment on the bond for a period of 16,08 months.¹⁵ The respondent applied to be placed under debt review in terms of the NCA which debt review process was terminated by the Bank by giving the respondent notice in terms of section 86(10) of the *National Credit Act 34 of 2005* (the “NCA”)¹⁶ which was delivered on 21 July 2022 to the respondent’s chosen *domicilium et citandi* address.¹⁷ Proof of service is contained in the track-and-trace report

¹⁰ Caselines 004 - 47

¹¹ Caselines 004-48

¹² Caselines 016-2 para 7

¹³ Caselines 016-3 para 7.2

¹⁴ Caselines 013-11 par 3

¹⁵ Caselines 013 – 12 par 4.3

¹⁶“Section 86(10) - If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to –

(a) the consumer;

(b) the debt counsellor; and

(c) the National Credit Regulator, at any time at least 60 business days after the date on which the consumer applied for the debt review.”

¹⁷ Caselines 004 – 12 par 17 to 004 – 13 - Particulars of Claim

annexed to the bank's founding papers.¹⁸ Summons was issued by the Bank against the respondent on 19 August 2022 and served at the property by affixing to the main entrance.¹⁹ No intention to defend the matter was filed by the respondent in respect of the monetary amounts claimed in the combined summons. The bank subsequently lodged these proceedings for default judgment in respect of the monetary amount claimed as well as for an order for execution of the property in terms of Rule 46A of the Uniform Rules of Court.

- [6] The Rule 46A application in terms of the Uniform Rules of Court was not served personally on the respondent, however, the respondent entered an appearance to defend the application and opposed the said Rule 46A application in terms of the Uniform Rules of Court. He thereafter filed his answering affidavit late²⁰. He later supplemented his answering affidavit with a more comprehensive supplementary affidavit.²¹ No issue was taken at the hearing of the matter to the filing of the supplementary by the bank's counsel, Adv Carvalheira, as the respondent was a lay person. The only exception requested by Adv Carvalheira was that no new facts raised by the respondent in the supplementary affidavit should be considered during the hearing of the application which the bank did not have an opportunity to address in reply. Adv Carvalheira also did not argue that condonation should not be granted to the respondent for the late filing of the answering and supplementary

¹⁸ Caselines 004 - 55- track-and-trace report and 009-10 par 13

¹⁹ Caselines 005-1 – 005-2 - Return of Service

²⁰ Caselines 018-1 to 018-2

²¹ Caselines 019 – 1 to 019-21

answering affidavit. The answering and supplementary answering affidavits were accepted into evidence on this basis.

- [7] Although not part of the papers, Adv Carvalheira, placed on record that at the time of the hearing of the matter the arrears had escalated to R495 081,05. This amount was not disputed by the respondent. The respondent averred, *inter alia*, that:

[7.1] He had paid approximately R 805 000 over 17 years, which, he contended, should have largely extinguished the debt;²²

[7.2] The bank extended the loan beyond his retirement age without proper affordability assessment, amounting to *reckless credit*;²³ and

[7.3] He attempted to negotiate a revised payment plan but alleged the bank demanded excessive lump-sum settlements.²⁴

- [8] The respondent avers that he offered to pay R 8 500 per month towards the arrear amount owed to the bank but that the bank refused this and wanted him to pay off the arrears in larger amounts. The respondent did not provide any proof of sustainable income on his part or any supporting documentation as to the affordability of the payment of R8 500,00 which he offered to pay. The bank denied these aforementioned allegations and alleged that the original loan agreement was entered into before the commencement of the NCA on 1 June 2007 and that the subsequent distressed restructured loan

²² Caselines 018-2 para 1 and 019-4

²³ Caselines 018-2 para 2 and 019 – 3 to 019 - 4

²⁴ Caselines 020-34 – 020-35

agreements complied with statutory affordability assessments.²⁵ It was not disputed by the respondent that affordability checks and assessments were conducted by the bank prior to the restructure agreements entered into in 2016 and 2019.

COMMON CAUSE ISSUES:

[9] The following is common cause between the parties:

[9.1] That the property serves as the respondent's primary residence, occupied by him and his spouse.²⁶

[9.2] That the loan agreement and mortgage bond was entered into with the respondent on 9 November 2006;²⁷

[9.3] The respective agreements, being the loan agreement and the mortgage bond, and their terms, have not been disputed by the respondent;

[9.4] That affordability checks and assessments were conducted by the Bank in respect of the respondent prior to the restructure agreements entered into in 2016 and 2019;

[9.5] That the respondent defaulted on the repayments on the loan agreement;²⁸

[9.6] The respondent applied to be placed under debt review but did not pursue this to finality;

²⁵ Caselines 020-8 – 020-11 - Replying Affidavit

²⁶ Caseline 009-11 para 18.1

²⁷ Caselines 009-9 paras 8-10

²⁸ Caselines 009-9 paras 11-12

[9.7] The applicant complied with Section 86(10) of the *NCA* and sent the requisite notice to the respondent in terms of section 86(10) of the *NCA* to the respondent terminating the debt review process with the respondent;²⁹ and

[9.8] The total arrears amounts to R1 054 746.50, 00.

ISSUES IN DISPUTE:

[10] The following issues are in dispute between the parties and are for determination:

[10.1] Whether the respondent has raised a valid defence in law to the Bank's claim;

[10.2] Whether the bank should be granted the monetary judgment as claimed in the POC;

[10.3] Whether the property should be declared specially executable under Rule 46A of the Uniform Rules of Court;

[10.4] If the property is to be declared specifically executable, what reserve price should be set under Rule 46A(9)(d) of the Uniform Rules of Court; and

[10.5] Whether the bank should be granted costs on an attorney and client scale in the application.

²⁹ CL 009-10 para 14;

APPLICABLE LEGAL PRINCIPLES:

[11] Streicher JA, in the matter of *Campbell versus Botha and Others*³⁰, held that there can be no sale in execution without a judgment and an attachment of that judgment. Once a monetary judgment is obtained against the judgment debtor the judgment creditor may seek to attach the immovable property of the judgment debtor in a sale in execution of the immovable property in question under Rule 46A of the Uniform Rules of Court. In the matter of *Absa Bank Ltd versus Mokebe and Related Matters*³¹ it was held that a 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. Thus the default of the debtor and the money judgment is a pre-condition for the entitlement of the mortgagee to foreclose. The court went on to hold that it is a long-standing practice for the creditor to claim judgment for the money debt and for executability of the pledged goods in one action.³²

[12] Rule 46A of the Uniform Rules of Court applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. In terms of Rule 46A(2) of the Uniform Rules of Court, a court considering an application under this rule must:

“2 (a)(i) establish whether the immovable property which the execution creditor

intends to execute against is the primary residence of the judgment

³⁰ *Campbell versus Botha and Others* 2009 (1) SA 120 (SCA) at par 11. See also *Absa Bank Ltd versus Mokebe and Related Matters* 2018 (6) SA 492 (GJ) at para 10

³¹ *Absa Bank Ltd versus Mokebe and Related Matters* 2018 (6) SA 492 (GJ) at para 14

³² 2018 (6) SA 492 (GJ) at para 16

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."

[13] In essence Rule 46A of the Uniform Rules of the Court allows for a possible deprivation of a person's right to adequate housing in terms of section 26 of the Constitution. Section 26(1) of the Constitution provides that "*everyone has the right to have access to adequate housing.*" This right requires courts to ensure that sales in execution of primary residences are not arbitrary. In *Jafftha versus Schoeman; Van Rooyen versus Stoltz*³³ the Constitutional Court held that judicial oversight is a constitutional prerequisite before a person's home may be sold in execution.³⁴ The principle was extended in *Gundwana versus Steko Development CC*³⁵, where the Court ruled that oversight is required in all cases involving the execution of residential immovable property, not only small-debt matters. The sole purpose of judicial oversight in all cases of execution against immovable property is first of all to ensure that the orders do not violate section 26(1) of the Constitution and that the judgment debtor is likely to be left homeless as a result of the sale in execution.

³³ *Jafftha versus Schoeman; Van Rooyen versus Stoltz* 2005 (2) SA 140 (CC)

³⁴ *Ibid* paras 29–43

³⁵ *Gundwana versus Steko Development CC* 2011 (3) SA 608 (CC) paras 40–54.

[14] This application brings to the fore the constitutional imperative to balance the rights of a credit provider who is the Bank in this instance to enforce its contractual rights with the protection afforded to the respondent debtor's right of access to adequate housing under section 26 of the Constitution. The High Court in *FirstRand Bank Ltd versus Folscher and Another, and Similar Matters*³⁶ listed the factors relevant to determining proportionality:

- (a) Whether the mortgaged property is the debtor's primary residence;
- (b) The circumstances under which the debt was incurred;
- (c) The arrears outstanding under the bond when the latter was called up;
- (d) The arrears on the date default judgment is sought;
- (e) The total amount owing in respect of which execution is sought;
- (f) The debtor's payment history;
- (g) The relative financial strength of the creditor and the debtor;
- (h) Whether any possibilities exist that the debtor's liabilities to the creditor may

³⁶ *FirstRand Bank Ltd versus Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) at 330C–D

be liquidated within a reasonable period without having to execute against the debtor's residence;

(i) The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;

(j) Whether any notice in terms of section of the National Credit Act 34 of 2005 ("NCA") was sent to the debtor prior to the institution of action;

(k) The debtor's reaction to such notice, if any;

(l) The period of time that elapsed between delivery of such notice and the institution of action;

(m) Whether the property sought to have declared executable was acquired by
means of, or with the aid of, a State subsidy;

(n) Whether the property is occupied or not;

(o) Whether the property is in fact occupied by the debtor;

(p) Whether the immovable property was acquired with monies advanced by the creditor or not;

(q) Whether the debtor will lose access to housing as a result of execution being

levied against his home;

(r) Whether there is any indication that the creditor has instituted action with an

ulterior motive or not; and

(s) The position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

[15] In the *Jaftha*³⁷ case *supra* the Constitutional Court held that any measure which permitted a person to be deprived of existing access to adequate housing limited the right protected in section 26(1) of the Constitution. The court held that instances where execution against a family home would be unjustifiable, would be for the recovery of a debt of a trifling amount to the creditor that would result in a disproportionate dispossession of the family of the debtor of their only shelter. Mokgoro J added that, bearing in mind the interests of creditors, there might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighed the harm caused to the debtor. In such circumstances, it might be justifiable to execute. In this sense, a consideration of the

³⁷ (2) SA 140 (CC), 2005 (1) BCLR 78 para 34

legitimacy of a sale in execution had to be seen as a balancing process. However, there would also be circumstances in which it would be unjustifiable to allow execution, because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor. Another factor of great importance would be the circumstances in which the debt arose. If the judgment debtor had willingly put his or her house up as security for the debt, a sale in execution should ordinarily be permitted where there had not been an abuse of court procedure. The need to ensure that homes might be used by people to raise capital was an important aspect of the value of a home, which courts had to be careful to acknowledge.

- [16] The Constitutional Court went further in the matter of *Jaftha supra* to set out the factors that a court might consider, but to which a court is not limited to in deciding whether the sale in execution of a judgement debtor's immovable property would be reasonable and justifiable. These factors are the circumstances in which the debt was incurred, any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court. Mokgoro J expressed that every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.³⁸

- [17] In the *Gundwana*³⁹ case supra the court held the following:

³⁸ (2) SA 140 (CC), 2005 (1) BCLR 78 para 59 and 60

³⁹ *Gundwana versus Steko Development CC* 2011 (3) SA 608 (CC) para 53

“Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders”.

- [18] These principles were reaffirmed in the *Absa Bank*⁴⁰ case *supra*, where the Full Court established procedural requirements for Rule 46A applications in terms of the Uniform Rules of Court, including the setting of a reserve price. The court held that it is thus incumbent upon the bank or bondholder to place ‘all relevant circumstances’ before the court when it seeks an order for execution. These factors include a proper valuation of the property under oath, the outstanding arrears, municipal accounts and the like information. This is not to thwart the mortgagee’s right to execution, to which it may be entitled, but to secure a just and equitable outcome.⁴¹

⁴⁰ 2018 (6) SA 492 (GJ) at para 49 – 70

⁴¹ 2018 (6) SA 492 (GJ) at para 57

[19] In *Standard Bank versus Hendricks and Another*⁴², the court held that determining the proportionality of the value of the property and the granting of the subsequent sale in execution entails weighing both the creditor's constitutional property rights under Section 25(1)⁴³ of the Constitution and the debtor's housing rights under Section 26(1) of the Constitution.

[20] In *Firststrand Bank Ltd versus Mdletye*⁴⁴, the court stressed that in the *Jaftha* and *Gundwana* cases the courts held that execution must be a last resort after reasonable alternatives fail. Once a court finds that an immovable property is specifically executable, Rule 46A(9)(d) of the Uniform Rules of Court specifically mandates the court to set a reserve price where the property is a primary residence unless exceptional circumstances exist.

MOTION PROCEEDINGS AND THE PLASCON-EVANS RULE:

[21] In *Plascon-Evans Paints Ltd versus Van Riebeeck Paints (Pty) Ltd*⁴⁵ the Court held the following when dealing with matters involving a dispute of fact:

“Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the

⁴² *Standard Bank versus Hendricks and Another* 2019 (5) SA 25 (WCC) paras 35–37

⁴³ “Section 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

⁴⁴ *Firststrand Bank Ltd versus Mdletye* 2020 (3) SA 450 (KZP) para 41

⁴⁵ *Plascon-Evans Paints Ltd versus Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C, discussed and approved in *Rail Commuters Action Group and Others versus Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 53

Court may adjudicate the matter on the basis of the facts asserted by the applicant.”

- [22] In essence applying the *Plascon-Evans* case the respondent's version prevails unless palpably false or untenable. The respondent does not deny entering into the loan agreement with the bank on 9 November 2006 and neither does he dispute that he entered into the 2016 and 2019 distress restructuring agreements with the bank. The respondent did not dispute terms of the respective agreements. The respondent further did not dispute that he received the requisite notice in terms of section 86(10) of the NCA and that his Debt Review process was terminated by the Bank. He also did not dispute that he was served with the combined summons as well as the current application for default judgment in the monetary amount claimed by the Bank in the POC as well as that he was served with the application in terms of Rule 46A of the Uniform Rules of Court. In addition to this the respondent does not dispute the arrears amount on the papers as well as the current arrears amount of R495 081,05 which is due to Nedbank as submitted to court by Adv Carvalheira at the hearing of the application. The respondent averred that the loan agreement and mortgage bond amounted to reckless credit that was given to him on the part of the bank and stands to be set aside. This was in light of the loan agreement only expiring after his retirement age and the bank failing to consider that he will in all probability not repay his debt during retirement.

[23] The NCA came into operation on 1 June 2007.⁴⁶ The respondent's original loan agreement pre-dates that date and thus in my view does not fall within the NCA's reckless credit regime. I am further of the view that even if it did fall within the NCA, the Bank contends that proper assessments of the respondent's financial position was done prior to entering into the loan agreement and mortgage bond in 2006. I am further of the view that the restructure agreements in 2016 and 2019 respectively, were mere amendments to the initial loan agreement and mortgage bond and not new credit agreements in itself as defined in Section 8 of the NCA. The 2016 and 2019 distress restructure loan agreements were a variation of the initial loan agreement which included an arrears portion where the respondent failed to pay on the initial loan agreement. It appears from the papers that the bank attempted in this way to accommodate the respondent's arrears up to that point whilst still maintaining the repayment on the existing mortgage bond.

APPLICATION TO THE FACTS OF THE CASE:

RESPONDENT'S DEFENCE ON THE MERITS:

[24] The respondent's assertion that the bank granted credit beyond his affordability and his retirement age lacks factual foundation. The record shows that he voluntarily entered into the 2019 distress restructure agreement when he already was aware of his future retirement circumstances.⁴⁷ His attempt to be placed under Debt Review was also not pursued.

[25] Section 80(1) of the NCA defines a reckless credit agreement as one where:

"1. The credit provider failed to conduct an assessment as required by section 81(2), regardless of the outcome;

⁴⁶ Proclamation R22 of 2006 (GG 28864 of 11 May 2006).

⁴⁷ Bundle 004-33 – 004-46

2. *The credit provider did conduct an assessment, but still entered into the agreement even though:*

- (a) The consumer did not understand or appreciate the risks, costs, or obligations under the agreement.*
- (b) Entering into the agreement would make the consumer over-indebted”*

[26] Section 81(2) places a duty on the credit provider to take reasonable steps to assess:

- (a) The consumer’s understanding of the risks and obligations.
- (b) Their debt repayment history.
- (c) Their financial means, prospects, and obligations

[27] In my view the reckless credit argument must also fail because the relevant statutory provisions were not applicable when the loan was advanced.⁴⁸ The bank further averred that a full assessment of the respondent’s financial position was done prior to entering into the loan agreement and distressed restructure agreements in 2016 and 2019. The respondent does not negate that such an assessment was done. It can be accepted on the evidence before me that when the initial loan agreement and the 2016 and 2019 distress restructure agreements were signed by the bank would have done an assessment into the respondents’ financial position especially in light of the respondent’s failure to repay the arrears at the time.

⁴⁸ Caselines 004-33 – 004-46.

APPLICATION TO THE FACTS:

[28] Applying the *Plascon-Evans* case, the respondent's version lacks particularity and evidential support.⁴⁹ The respondent claims that R 805 000,00 worth of repayments should have extinguished the debt but this ignores the effect of capitalised interest and extended repayment periods. The total loan amount in terms of the 2019 Distressed Restructure Agreement is for R2 399 713,74 over a period of 207 months.⁵⁰ Thus, payment of R805 000,00 by the respondent is not the full amount owed to the bank. The bank's certified statement of balance supports the quantum claimed of R1 054 746.50, 00.⁵¹ I find sympathy for the predicament that the respondent, but he entered into the restructured distress loan agreements in 2016 and 2019 well aware that the debt would only be paid up in 2037 well after his retirement age of 65 years old.

[29] As held in *Standard Bank case* supra, courts must give effect to lawful contractual rights subject only to constitutional proportionality.⁵² I cannot find any misrepresentation or coercion by the bank as alleged by the respondent. If anything by entering into the 2016 and 2019 distress restructuring agreements, the Bank exercised the option of affording the respondent the opportunity to make good on the arrears amount. This by inference meant that they took into consideration the deterioration in the respondent's financial

⁴⁹ *Plascon-Evans* supra at 634E–635C

⁵⁰ Caselines 004 - 47

⁵¹ Caselines 020-25

⁵² *Standard Bank versus Hendricks and Another* 2019 (5) SA 25 (WCC) paras 10 to 11

position. The respondent has chosen not to bring the court into his confidence and has not placed his financial position before the court, or if he is in possession of any movable assets that could be sold to settle the arrears. The respondent furthermore did not disclose whether he received any pensionable amounts when he retired so as to have been able to pay off some of the arrears as well as a portion if not all of the mortgage bond at the time that he retired. He is silent on this aspect.

[30] The bank's version is supported by documentation filed on record and must therefore prevail. I am satisfied that the bank has complied with all procedural requirements under Rule 46A(3)–(5) of the Uniform Rules of Court and section 86(10) of the NCA. The arrears on the papers exceed R 174 348, 94 and it is common cause that at the time of the hearing of the matter has reached R495 081,05 with no payment being made by the respondent since December 2022.⁵³

[31] No alternative accommodation or dependents of the respondent were identified during the hearing of the matter.⁵⁴ The respondent does however have a wife who is said to be employed and in receipt of a housing subsidy.⁵⁵ I have not been provided with any facts regarding the respondent's financial position since he went on retirement and whether he would have received any pension payout or monthly pension amount. It is interesting to note that the respondent made no allegation in his papers that he and his family would be rendered homeless if the execution order is granted. I am alive to the fact that the respondent has consistently offered to repay an amount of R8 500,00 per

⁵³ Caselines 016-3 para 7.2

⁵⁴ Caselines 022-13 para 51

⁵⁵ Caselines 022-13 para 51

month towards the capital and arrears. The bank however contends that this offer would not even cover the repayment amount on the 2019 distress restructure loan agreement which is R11 592, 82⁵⁶ per month, let alone the arrears on the mortgage agreement. I am in agreement with this submission by the bank. If anything, the amount of R8 500,00 offered by the respondent is an indication of possible available funds to obtain alternative accommodation with should an order be granted in favour of the sale in execution.

- [32] I am mindful that the bank entered into the further distress loan agreements with the respondent in 2016 and 2019 partially because the respondent was in arrears at that stage. I can only conclude from this that the respondent's financial woes towards the repayment of the loan agreement and mortgage bond started prior to his retirement. His argument must therefore fail that the bank should have taken his retirement age into consideration in repaying the amounts owed as well as his inability to pay the amounts in his retirement as he was already in arrears at the time when the 2016 and 2019 loan agreements were concluded. In my view the bank was already aware of the respondent's financial position thus considering a restructure of the initial loan agreement and mortgage bond. If anything, the evidence shows that after signing the 2019 distress restructure loan agreement, the respondent was able to make repayments on the mortgage bond right up until 23 December 2022, some three years thereafter. This to my mind is an indication that the bank had been satisfied that the respondent was able to repay the loan agreement at the time when the 2019 agreement was concluded.

⁵⁶ Caselines 004-47

[33] I have had consideration of the prejudice to the bank who has been unable to recover its arrear amounts owed on the mortgage bond for an extended period of time and this in my view outweighs the prejudice to the respondent, who retains the right to reinstate the agreement prior to the sale in execution of the property under section 129(3) of the NCA.⁵⁷ The respondent proposes no method of how he could potentially repay the arrear loan agreement amounts. He has been living in the property essentially paying little to none in respect of the utilities. I am therefore satisfied that the bank has shown on a balance of probabilities that there are no alternative remedies available to the bank to recover the amounts owed from the respondent. The proportionality enquiry thus favours the bank and an order authorizing the sale in execution of the property is necessary and constitutionally justifiable.

RESERVE PRICE:

[34] In the *ABSA Bank versus Mokebe*⁵⁸ case supra, the Full Court stated the following with regards to the setting of a reserve price:

“[53] The determination of a reserve price is an issue which is provided for in the Rules of Court. The sale of a property and in particular of a primary residence, for nominal amounts of money occurs to the detriment of the defaulting home owner. Such a person, whether the poorest of the poor or otherwise, not only loses his or her home but remains indebted to a mortgagee for a substantial amount - even in cases where the on-sale of the

⁵⁷ “Section 129 (3) Subject to subsection (4), a consumer may-

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts 10 that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement; and-

(b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment 15 order.

⁵⁸ 2018 (6) SA 492 (GJ) at para 53

property occurs to buyers at substantially higher prices than the prices realised during the sale in execution”

[35] The court went on to state the following at paragraph 57 of the judgment:

“The courts’ power and duty to impose a reserve price is founded, inter alia, in s 26(3) of the Constitution. The process of granting judgment against the home owner is the first step that may lead to his or her eviction from the property. Thus a court is to consider all the relevant factors when declaring a property specially executable at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place ‘all relevant circumstances’ before the court when it seeks an order for execution. This, in our view, includes a proper valuation of the property (under oath), the outstanding arrears, municipal accounts and the like information. This is not to thwart the mortgagee’s right to execution, to which it may be entitled, but to secure a just and equitable outcome. It is not a prohibition to realise a bank’s security as is suggested in the affidavit filed by Investec. The oversight duty is a far cry from such perceived prohibition. This is based on s 1 of the Constitution which places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms which would include the application of s 26 of the Constitution by a court, having regard to all the relevant circumstances, before sanctioning the process that may lead to the ultimate eviction from a home. This is not to hamper the ability of the mortgagee to execute but that very process requires oversight....”

[36] Three valuations appear from the record on caselines: an automated market valuation of R1 190 000, 00 as part of the Lightstone Report Bundle,⁵⁹ a sworn valuation compiled by Ronel Janse Van Rensburg an independent evaluator of R1 100 000,00⁶⁰ and a municipal valuation of R 1 330 000,00.⁶¹ The amount owing to the municipality for rates as per the papers is R100 310, 43.⁶² Having had regard to these figures and deducting the estimated municipal arrears of R 100 310.43, a reserve price of R 550 000,00 in my view might be slightly too low. I am of the view that an amount of R650 000,00 as a reserve price is more appropriate. This aligns with the guidance in the *Mokebe* case *supra* and ensures a fair balance between debtor protection and creditor recovery.

CONCLUSION:

[37] The respondent in my view has not established a defence that would be successful in law or fact. The arrears are substantial and material, the debt remains due and payable and there is no indication of any payments being made even on the amount of R8 500,00 as offered by the respondent. In my view the defendant has failed to show any other alternative means available to the Bank to satisfy the debt. I am further of the view that the procedural requirements have been met. Applying the proportionality principles in *Jaftha*, *Gundwana*, *Folscher*, and *Mokebe*, I am satisfied that execution is justified and constitutionally compliant.

⁵⁹ Caselines 009 – 36 to 009 - 41

⁶⁰ Caselines 009 – 31 to 009 - 35

⁶¹ Caselines 009 - 42

⁶² Caselines 016 – 4 para 7.5.2

COSTS:

- [38] It is trite law that costs should be granted in favour of the successful litigant which in this case is the bank. It was a terms of the loan agreements that the costs of any breach and default of the loan agreement by the respondent will be on an attorney-and-client scale.

ORDER:

- [39] Judgment is accordingly granted in favour of the applicant against the respondent for:

[39.1] Payment of the amount of R 1 054 746.50;

[39.2] Payment of interest on the amount of R1 054 746,50 at the rate of 7 % per annum, calculated and capitalised monthly in advance in terms of the mortgage bond from 21 July 2022 to date of payment;

[39.3] The property known as Erf 1[...] Elspark Extension 1 Township, Registration Division I.R., Province of Gauteng, also known as [...] K[...] Street, Elspark Ext 1, is declared specially executable;

[39.4] The Registrar is authorised to issue a Warrant of Execution for the attachment of the respondent's aforementioned property;

- [39.5] The respondent may in terms of the provisions of section 129(3)(a) of the National Credit Act 34 of 2005 at any time before the applicant has cancelled the agreement re-instate the agreement by paying the amounts referred to in paragraph 6 of this order below;
- [39.6] The respondent may prevent the sale of the property referred to in paragraph 32.3 of this order if he pays to the applicant all of the arrear amounts owing to the applicant, together with the applicant's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement, prior to the property being sold in execution;
- [39.7] A reserve price of R 650 000.00 is set for the sale in execution;
- [39.8] A copy of this order must be personally served on the respondent before any sale in execution;
- [39.9] The respondent is to pay the costs of this application on the attorney-and-client scale.

M NAIR

ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of appearance: 9 June 2025

Date Judgment delivered: 8 October 2025

Appearances:

For the Applicant: Adv R Carvalheira

Instructed by: Hammond Pole Attorneys

For the Defendant: In Person