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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: 1288/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 27 October 2025

SIGNATURE:

In the matter between:

S[...] A[...] M[...]

APPLICANT

-and-

S[...] P[...] M[...]

1ST RESPONDENT

ABSA BANK LTD

2ND RESPONDENT

GREATER TZANEEN LOCAL MUNICIPALITY

3RD RESPONDENT

Delivered : 27 October 2025

This reasons for the judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **27 October 2025 at 10:00 am.**

Date heard : 16 October 2025

Coram : Bresler AJ

REASONS FOR JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicant's application was dismissed with costs on attorney and client scale on the 16th of October 2025. What follows is the reason for the order made on the aforesaid date.

[2] The Applicant applies for relief to the effect that the Applicant is removed from the mortgage bond in terms whereof the Applicant and the 1st Respondent are jointly responsible for the repayment of the debt. The bond is registered over the immovable property of the Applicant and the 1st Respondent.

[3] In the alternative to the aforesaid, the Applicant prays for the sale of the immovable property to recover the outstanding bond amount.

[4] The Application is opposed by the 1st Respondent and the Applicant. The 1st Respondent did not file Heads of Argument.

[5] The Applicant's case is premised on the following facts: the Applicant and the 1st Respondent were married in community of property which marriage was dissolved by a decree of divorce granted during 2012. In or about 2017 a bond was registered over the immovable property of the parties situated at Erf 2[...] Tzaneen Ex 52.

[6] According to the 1st Respondent, this property formed part of the joint estate. This allegation is not rebutted by the Applicant on the papers before court. In accordance with the divorce order annexed to the Founding affidavit, a settlement agreement was concluded between the parties. It is not clear from either party's version as to how the joint estate, existing at the time of the divorce, is to be divided or what the settlement agreement entailed.

[7] The opposition by the 2nd Respondent is quite evident. The 2nd Respondent is not concerned with the breakdown in the relationship between the Applicant and the 1st Respondent. Both parties committed to a contractual liability and unless the 1st Respondent qualifies to be absolved from the bond, the 2nd Respondent will not consent to absolve the Applicant from its responsibility in terms of the bond.

[8] The Applicant consequently revised the relief to make provision, in the alternative to absolving the Applicant, for the sale of the property and for the proceeds to be utilized to pay the bond and the municipal account.

[9] The Court is consequently called upon to determine if the Applicant should be absolved and / or removed from the bond, alternatively if the property should be sold.

[10] As to the removal of the Applicant from the bond, the applicant's approach is fatally flawed. The applicant cannot unilaterally resile from an agreement concluded between the applicant and the 2nd Respondent. This constitutes repudiation. It is clear that the 2nd Respondent was not willing to accept the repudiation and elected to enforce the agreement which it was entitled to do.

[11] The principle of *pacta sunt servanda* is well established in our law. Public policy requires contracting parties to honour their obligations that has been freely and voluntarily undertaken.

[12] In **Baedica 231 CC and Others v Trustees, Oregon Trust and Others**¹ the Constitutional Court reaffirmed the principle that disproportionality or unfairness are not separate self-standing grounds upon which a court may generally refuse to enforce contractual provisions. It was specifically stated that a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. The Constitutional Court stated that it is only when the contractual term was so unfair, unreasonable or unjust that it was contrary to public policy that a court may refuse to enforce it.

¹ 2020 (5) SA 247 (CC). Also enunciated in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) and **Botha v Rich NO** 2014 (4) SA 124 (CC)

[13] It is thus evident that the relief claimed by the Applicant to absolve him from his contractual obligations, is bad in law in the absence of proof that the terms of the agreement is contrary to public policy.

[14] As to the alternative relief, no case is made out in the Founding affidavit to this effect. No supplementary affidavit was delivered to explain the basis on which the property is to be sold and the consequences of such sale. The law has always been trite: the Applicant must make out its case in the Founding affidavit.

[15] In this Court's view, a partnership agreement of sorts came into effect between the Applicant and the 1st Respondent in terms whereof certain arrangements were made as to the contributions towards the partnership. The Court is also not privy to the settlement agreement concluded during the divorce which should have addressed the position of the immovable property.

[16] There is simply no case made out in the Founding affidavit that would substantiate a prayer for the dissolution of the partnership and for the winding up of the partnership estate. It appears in any event that the potential terms of this partnership is disputed. Application proceedings are not aimed at resolving a factual dispute. It would not be appropriate to determine the dissolution of this alleged venture on the papers before court.

[17] Consequently, the alternative relief must also fail.

Costs:

[18] The Applicant failed to take reasonable steps in order to bring the matter to finality. More specifically, the Applicant did not file a Replying affidavit, nor did the Applicant timeously deliver its Heads of Argument. Applicant's counsel simply handed up the Heads of Argument prior to hearing of the matter in Court.

[19] Having regard to the fatally flawed case of the Applicant and the manner in which the Applicant conducted itself during the proceedings, this Court holds the

view that the Respondents should not be left out of pocket. As such, a cost order on attorney and client scale is warranted.

Order:

[20] In the result the following order was made:

20.1 The application is dismissed.

20.2 The Applicant is ordered to pay the costs on attorney and client scale.

**M BRESLER AJ
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

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