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**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: A105/2024**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE 26 May 2026

MOKOSE SNI

In the matter between:

CALVIN KAGISHO THEKO Appellant

and

FIRSTRAND BANK LIMITED Respondent

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JUDGMENT

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MOKOSE J (POTTERILL J AND JANSE VAN NIEUWENHUIZEN J CONCURRING)

[1] The appellant appeals against the whole order of Sardiwalla J of 17 October 2022 in which the following order was granted in favour of the respondent:

(i) payment of the sum of R4 792 169,21;

(ii) payment of interest on the sum of R4 792 169,21 at 6.75% per annum calculated daily and compounded monthly in arrears from 30 January 2022 to the date of payment, both days inclusive;

(iii) that the following immovable property be declared specially executable in terms of Rule 46A, with a reserve price of R3 900 000:

THE REMAINING EXTENT OF ERF 2[...] S[...] EXTENSION 24 TOWNSHIP

REGISTRATION DIVISION I.R. THE PROVINCE OF GAUTENG

MEASURING 1996 (ONE THOUSAND NINE HUNDRED AND NINETY-SIX) SQUARE METRES

HELD BY DEED OF TRANSFER T14696/2001

KNOWN AS 4[...] A[...] STREET, SANDOWN, 2196

(iii) that in the event that the reserve price set by the court is not achieved at the first sale, then and in that, the immovable property described above may be sold at any subsequent sale in execution to the highest bidder, without a reserve price;

(iv) that the Registrar is authorised to issue a Warrant of Execution against the immovable property described above;

(v) that the Respondent pay the costs of this application on the scale as between attorney and client.

[2] This order was granted without any reasons being provided. Furthermore, it is common cause between the parties that Sardiwalla J had, pursuant to argument on behalf of both parties, refused to accept a supplementary affidavit filed by the appellant herein. This refusal is not recorded in the order. This appeal is unique in that Sardiwalla J granted leave to appeal without giving reasons for his order. No reasons could be obtained from Sardiwalla J as he retired due to a medical condition and reasons cannot be obtained. The parties agreed that the appeal be heard despite no reasons being provided. This Court will approach the matter as if *de novo* before us.

[3] This appeal is based on the allegation that the appellant was over-indebted when the credit facility agreement was concluded and that the respondent granted the appellant reckless credit. Furthermore, the applicant appeals against the refusal by Sardiwalla J to allow the filing of a supplementary affidavit.

[4] The brief facts are as follows: on 28 May 2018 the appellant and the respondent concluded a credit facility agreement in terms of which the respondent agreed to advance the appellant the sum of R4 160 000,00 the salient terms of which were, *inter alia,* the following:

(i) the facility would be repayable over a period of 240 months;

(ii) a failure on the part of the appellant to pay any amount owing to the respondent when due would constitute a default in terms of the credit facility agreement;

(iii) should the appellant fail to remedy the default within 10 business days of being informed of such default in writing, the respondent would be entitled to, *inter alia,* require that the whole amount outstanding on the credit facility agreement be paid in full or exercise its rights in terms of all or any of the security documents, including but not limited to the right to realise the security thereunder.

[4] As security for the indebtedness to the respondent, the appellant bound as a first mortgage bond his immovable property in terms of Mortgage Bond B[...]. The appellant defaulted on the credit facility agreement in respect of the monthly instalments due whereupon the respondent called upon the appellant to remedy the said default. The respondent avers that it attempted to avoid litigation and called upon the appellant to attend a meeting to discuss the default, to which the appellant did not respond. Notices were sent to the appellant in terms of Section 129(1) of the National Credit Act 34 of 2005, but the appellant failed to make payment of the outstanding amount. It was on this basis that the respondent launched the application in which Sardiwalla J granted the order.

[5] The first ground of appeal noted by the appellant is that Sardiwalla J erred, *inter alia,* in not allowing and duly considering the supplementary evidence proffered by the appellant in its supplementary affidavit.

[6] Ordinarily, and in motion proceedings, three sets of affidavits are filed, being the founding affidavit, the answering affidavit and the replying affidavit. The court may, in certain circumstances, exercise its discretion and permit the filing of further affidavits by the parties. It must be in exceptional circumstances that such affidavits are permitted and where the court considers it

advisable to do so.[1] There must, however, be a proper and satisfactory explanation as to why the facts or information contained in the additional affidavit was not placed before the court earlier and the court must also be satisfied that the opposing party would not be prejudiced by the introduction of the supplementary affidavit, which prejudice cannot be remedied by a costs order.

[7] In his supplementary affidavit, the appellant sought to furnish the court with additional information pertaining to the credit agreements he alleges were not part of the credit facility agreement concluded with the respondent. No explanation was proffered as to why the information was not furnished in the answering affidavit.

[8] The legal principles pertaining to the filing of further affidavits in motion proceedings are as follows:

(i) there are normally three sets of affidavits in motion proceedings;

(ii) the court, having granted leave to file a further affidavit, will exercise its discretion in permitting further affidavits to be filed in consideration that a matter must be adjudicated upon all facts relevant to the issues in dispute;

(iii) only in exceptional circumstances will a court allow the filing of a further set of affidavits once the issue of fairness to both parties has been ascertained;

[9] As we do not have the reasons for the refusal by Sardiwalla J, we will deal with this aspect *de novo*. We are of the view that the principles as espoused above pertaining to the introduction of a further application have not been met. There is no proper and satisfactory explanation for the failure on the part of the applicant why the information sought to be introduced in the further affidavit was not furnished in the founding affidavit. Accordingly, I am of the view that the court *a quo* correctly disallowed the introduction of the supplementary affidavit. There is no basis to overturn the decision of Sardiwalla J to disallow the supplementary affidavit.

[10] As stated above, a further ground of appeal is based on the allegation that the appellant was over-indebted when the credit facility agreement was concluded and that the respondent granted

[1] Riesenberg v Riesenberg 1926 WLD 59

the appellant reckless credit. The onus of proving that the credit extended was reckless lies on the consumer who alleges same.[2]

[11] Section 79 of the National Credit Act 34 of 2005 ("the Act") provides that a consumer is considered over-indebted if the preponderance of available information at the time a determination is made, indicates that the particular consumer is or will be unable to satisfy in a timely manner, all the obligations under all the credit agreements to which the consumer is a party.

[12] Section 81 of the Act requires the credit provider to take reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the intended credit; the rights and obligations of the consumer under a credit agreement; debt repayment history including his financial means, prospects and obligations; whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose when applying for that credit agreement.

[13] The appellant contends that the respondent failed or neglected to demonstrate in its founding affidavit and replying affidavit that it had taken reasonable steps to conduct the assessment as mandated in Section 81 of the Act. Alternatively, the appellant contends that assuming the assessment had been conducted, the respondent concluded the Structured Facility despite the preponderance of information available to it indicating that it would make the appellant over-indebted.

[14] The respondent brought to the court's attention the fact that prior to the launching of the application which forms the subject of this appeal, it had instituted a similar application against the appellant based on the same facts. However, the previous application was withdrawn as it had been issued prematurely. The appellant had opposed the application and filed an answering affidavit in which he had failed to place reckless credit in issue. The appellant merely averred in the answering affidavit that 'despite the termination of his employment and attendant loss of income, he continued to service his contractual obligations in respect of facilities he had with the respondent, albeit not punctually'. The appellant further contended that he had a steady and substantial income which

[2] Johnson v The Standard Bank of South Africa Ltd [2024] ZANWHC 237 (10 September 2024)

would enable him to ‘bring his accounts up to date and service his monthly obligations under the facilities provided by the respondent’.

[15] The appellant’s version regarding reckless credit is therefore contradictory to his earlier version and is misplaced if one has regard to that version. The court in the matter of *Standard Bank of South Africa Limited v Sithole*[3] held as follows:

*“The respondents’ reliance on alleged reckless credit and/or over indebtedness at this stage, seems misplaced if one has regard to their unequivocal undertaking to settle the arrears as and when their cash flow permits same. The respondents cannot be allowed to have the best of both worlds. It is evident that they would wish to honour their obligations in terms of the agreement and as such the reliance on this defence does not assist the respondents in any way.”*

[16] I agree with the respondent that the conclusion reached in the matter of *Standard Bank of South Africa v Sithole (supra)* is justified in this matter. The appellant cannot be allowed to have the best of both worlds.

[17] The appellant contends further that he (the appellant) was over-indebted when the credit facility agreement was concluded and that the respondent granted him reckless credit. His monthly payment obligations exceeded his monthly income at the time that the credit facility agreement was concluded. He avers that his monthly income was the sum of R124 788,65 and his monthly payment obligations amounted to R128 317,00. This was a clear over indebtedness as there was a shortfall of R3 528,35.

[18] In response thereto, the respondent brought to the court’s attention that it was a specific condition of the credit facility agreement that certain of the appellant’s existing liabilities were to be settled from the proceeds of the facility. Those facilities were listed on the credit facility agreement but were included by the appellant in the list of monthly payment obligations. This resulted in the appellant overstating his monthly payment obligations by an amount of R19 848,00. Accordingly, there was no shortfall but a substantial surplus when the credit facility agreement was concluded.

[3] [2021] ZAGPJHC 456 (23 September 2021) at para [9]

[20] The versions of both the appellant and the respondent are clearly contradictory and irreconcilable. Motion proceedings are designed to resolve legal questions and not questions of fact. The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts stated by the applicant that are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent of the facts alleged by the applicant is not such as to raise a real, genuine and *bona fide* dispute of fact.

[21] In assessing whether a dispute of fact on the papers has been genuinely raised, the court does not go into the merits of the respondent's defence. It merely considers whether the respondent's averments, if they were to be established in a trial, would make out a defence to the applicant's claim. The court would also assess whether the respondent's averments making out a *prima facie* defence are made *bona fide.*

[22] In my view, the appellant (respondent in the court *a* quo) failed to make out a defence to the respondent's claim (applicant in the court *a quo*). The appellant's allegations of over-indebtedness were based on an overstatement of his monthly expenses as stated above. Furthermore, the appellant's reliance of reckless credit was contradicted by his prior sworn statement in the earlier application where he affirmed his ability to service the debt. No mention of reckless credit was made therein. This constitutes a waiver of such defence and undermines the later version.

[23] Accordingly, I am of the view that the order granted by the court *a quo* was justified in respect of the monetary judgment and the declaration of executability of the immovable property under Rule 46A of the Uniform Rules of Court.

[24] This matter was before the court on 12 November 2025 where it was postponed and the costs reserved. There is no reason why the costs should not follow the order.

[25] Accordingly, the following order is granted:

The appeal is dismissed with costs on an attorney and client scale. This includes the costs of the appearance and postponement of the matter on 12 November 2025.

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SNI MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree

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S POTTERIL J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

I agree

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N JANSE VAN NIEUWENHUIZEN J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Appellant: Adv WJ Roos

On instructions of: Biccari Bollo Mariano Inc

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| For the Respondent: | Adv NG Louw |
| On instructions of: | Rorich Wolmarans & Ruderitz Inc |

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| Date of Hearing: | 4 March 2026 |
| Date of Judgment: | 26 May 2026 |