Editorial note: Certain information has been redacted from this judgment in compliance with the law.

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(1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2018/17056

In the matter between:

ABSA BANK LIMITED Applicant/Plaintiff

and

NATALIE DIANN SAWYER (nee MURISON) Respondent/Defendant

JUDGMENT

VAN EEDEN AJ:

1. The plaintiff is a bank and registered credit provider. It issued a combined summons on 7 May 2018 against the defendant, claiming payment of an amount of money from her, as well as an order

declaring immovable property constituting her primary residence specially executable. The summons states that the defendant is a major female married out of community of property with her chosen *domicilium citandi et executandi* situated at [redacted] Road, B[redacted] and that the mortgaged property forming the subject matter of the application, is situated at [redacted] Avenue, B[redacted].

2. In the summons the defendant's attention is drawn to section 26(1) and (3) of the Constitution, as well as rule 46A of the High Court Rules. The defendant was advised to place information before the court if she contended that the order sought in respect of execution of the immovable property infringes upon her right of access to adequate housing. She was similarly advised that the court will not authorise execution unless the court, having considered all relevant factors, considers that execution against the immovable property is warranted. She was advised that should she object to the immovable property being declared specially executable, she could in terms of rule 46A(6)(b) of the High Court Rules defend the relief sought in the action, or defend the action and make submissions which are relevant to the making of an appropriate order by the court, or without defending the action, make submissions which are relevant to the making of an appropriate order by the court. In addition, she was advised that the provisions of section 129(3) and (4) of the National

Credit Act, 34 of 2004 applied to the credit agreement. Finally, she was advised that she could prevent the loss of the mortgaged property if she paid to the plaintiff all the arrear amounts owing.

3. The particulars of claim attached to the combined summons gave more detailed information in relation to amount of money claimed:

3.1. During February 2014 a first mortgage loan agreement was concluded between the parties in terms of which the plaintiff lent and advanced an amount of R3 560 000.00 to the defendant.

3.2. A year later, during March 2015, a second mortgage loan agreement was concluded in terms of which the plaintiff lent and advanced the amount of R3 572 560.20 to the defendant.

3.3. The two loans are secured by two mortgage bonds over the mortgaged property.

3.4. The defendant's indebtedness is stated to be R3 835 238.56 together with interest at the rate of 11.10% per annum, capitalized monthly, from 30 January 2018 to date of

payment on the outstanding amount. The indebtedness and interest rate were supported by a certificate of balance.

4. The particulars of claim deal in detail with the order sought declaring the immovable property executable:

4.1. The plaintiff could not confirm whether the immovable property was the defendant's primary residence, but conceded that it was.

4.2. The defendant's last payment towards the mortgage loan instalment was made on 5 January 2018 and she had been in arrears for approximately ten months.

4.3. At the time of instituting the action the defendant was in arrears in the amount of R405 335.40 with a monthly repayment instalment being R38 401.18.

4.4. Prior to issuing summons the plaintiff took all reasonable steps in order to conclude an arrangement with the defendant to enable her to comply with her obligations so as to avoid foreclosure.

4.5. The defendant was not willing or able to adhere to any arrangements. This effectively left the plaintiff with only one option, which was to institute these proceedings.

4.6. The defendant was advised that she may, at any time before the plaintiff has cancelled the loan agreements, make payment of the amount that is overdue.

4.7. The defendant was informed that the plaintiff will apply for default judgment in the event that the matter is not defended and will proceed to apply to have the immovable property declared executable.

4.8. At the date of issuing summons the full balance outstanding amounted to R3 949 984.71. This amount was stated to be of a substantial nature and that the defendant would consequently most probably not be in a position to make payment of the overdue amount, to reinstate the loan agreements and to continue with her monthly obligations.

4.9. The defendant may prevent the loss of the immovable property if she pays to the plaintiff all the arrear amounts.

4.10. The arrear amount was not the full amount of the judgment debt, but the amount owing by the defendant to the plaintiff without reference to the accelerated amount.

4.11. The loan agreements were called up on 19 March 2018 and a computerised copy of the account printout was attached. From the computerised printout it appeared that when the loan agreements were called up, the defendant was in arrears in the amount of R290 131.86 and when legal action was instituted, the defendant was in arrears in the amount of R405 335.40.

4.12. To the best of the plaintiff's knowledge the immovable property was occupied by the defendant.

4.13. The indebtedness arose as a result of a loan that the defendant obtained from the plaintiff to purchase the property.

4.14. There is a business relationship between the plaintiff and the defendant. The plaintiff is a public company and has various financial obligations that it must meet. It cannot comply with its obligations if it does not generate an income, which may

happen if the plaintiff is unable to recover monies legitimately lent and advanced to the defendant.

4.15. The plaintiff was unable to establish whether the defendant has any other assets which can be attached to settle the outstanding amount. Given the substantial outstanding amount, it was unlikely that movables would satisfy even a small portion of the outstanding amount.

4.16. The plaintiff was of the view that attachment and sale of movable property would only delay the inevitable sale of the property.

4.17. The plaintiff would suffer more than the defendant would if the court refused to grant execution against the immovable property.

4.18. The plaintiff relies on the sanctity of contracts, which must be upheld in order to secure the future lending of credit to prospective borrowers.

4.19. Should this prospective lending process in any way be prejudiced by the court not declaring the immovable property

especially executable, the very basis of credit and borrowing in South Africa comes under pressure, which entails that the future provision of credit becomes impossible.

4.20. The defendant would suffer minimal prejudice and the defendant's right to adequate housing will not be affected when declaring the property especially executable. The defendant will still be able to procure immovable property in line with her budgetary constraints, which will suffice as adequate housing for residential purposes. Access to adequate housing must not be equated to home ownership.

4.21. Accordingly, the defendant will not be rendered homeless and destitute if the court should declare the property executable.

4.22. Should it be declared executable, the defendant cannot immediately be evicted. Once the immovable property is registered in the name of the new owner, such new owner still has to institute an application for eviction and ejectment should the defendant remain in unlawful occupation of the property.

4.23. The plaintiff was unable to state whether there is a household headed by women, disabled persons, aged persons or if there were children living on the property.

4.24. On 23 January 2018 the plaintiff's legal representatives addressed various emails to the defendant drawing the defendant's attention to the legal proceedings with the purpose of making an arrangement for settling the arrears.

4.25. The defendant's attention was drawn to section 21(6) and (3) of the Constitution which affords everyone the right to adequate housing and provides that no one may be evicted from their home without an order of court after consideration of all the relevant circumstances. The defendant was called upon to place information regarding relevant circumstances within the meaning of section 26(3) of the Constitution before the court.

4.26. In addition, the defendant's attention was drawn to rule 46A(2)(b), which provides that no writ of execution shall be issued against the primary residence unless the court orders execution against such property.

4.27. If the defendant objects to the residence being declared executable, the defendant must place facts and submissions before the court to enable the court to consider them in terms of rule 46A(2)(b). Should the defendant fail to do so, this may result in an order declaring the residence specially executable being granted, consequent upon which the defendant's residence may be sold in execution.

5. On 25 May 2018 the defendant's attorneys of record filed a notice of intention to defend. This triggered the application for summary judgment, which is supported by an affidavit:

5.1. The deponent stated that he is the Vice President in the employ of the plaintiff's Legal Home Loans: Defendant Portfolio.

5.2. He provides some details relating to his personal knowledge of the matter. He verified both the cause of action as set out in the summons and the amounts claimed in respect thereof.

5.3. In his opinion, he stated, the defendant did not have a good and *bona fide* defence to the plaintiff's claim and appearance had been entered solely for the purposes of delay.

6. An affidavit resisting summary judgment was deposed to by the defendant:

6.1. She states that she is an adult female Chief Operating Officer.

6.2. The plaintiff's attorneys set the matter down as a liquidation application. She submitted that the uncertainty caused by this ought to be sufficient for the application to be dismissed with costs.

6.3. Nevertheless, she proceeded to set out submissions relating to the summary judgment application. Apart from denying that she was indebted to the applicant, either in the amount claimed or at all, she also denied that she does not have a *bona fide* defence and that she had entered an appearance to defend solely for the purpose of delay.

6.4. She stated that she had *"numerous points* in limine*"* to the application for summary judgment, the first of which was that the particulars of claim were excipiable. A notice to remove cause of complaint in terms of rule 23(1) was served on 19 June 2018. The period within which the plaintiff could

remove the cause of complaint expired on 10 July 2018, but the plaintiff did not amend the particulars of claim.

6.5. The defendant claimed that the deponent's designation as *"Vice President"* did not exist. She had made enquiries with the plaintiff's offices to verify the designation and was told that it did not exist. Furthermore, she stated that such a designation *"is a very senior position within an organisation or division and not one which would necessitate and/or require the person holding such a position to become acquainted with the cause of action and amount claims, to the degree necessary for the purposes of Summary Judgment"*.

6.6. She admitted that she had entered into the mortgage loan agreement of February 2014 and that the first mortgage bond was properly registered. During March 2015 she faced cash flow constrains and entered into negotiations with the plaintiff to restructure the first loan agreement. She admitted that she signed documents placed before her by the plaintiff, but stated that her understanding was that the documentation was necessary to facilitate the restructuring of the first loan agreement. She did not read the documentation, as she trusted that she was simply signing a

restructuring agreement. It has now transpired that she had entered into a second loan agreement with a second mortgage bond having been registered over the property in issue. She therefore stated that there had been a bona fide contractual mistake in that she and the plaintiff were not *ad idem* with regards to the terms that were to apply to the second agreement.

6.7. She took issue with the amount being claimed. She drew attention thereto that at different dates the outstanding amount differed. These various amounts were stated to be conflicting and could therefore not be said to have met the test required at summary judgment level. She stated that the plaintiff had failed to make out a proper case and again denied being indebted to the plaintiff, either in the amount claimed or at all.

7. When the application for summary judgment was enrolled the plaintiff's attorney had to comply with chapter 10.17 of this division's Practice Manual. The heading of this chapter reads *"Foreclosure (and execution when property is, or appears to be, the defendant's primary home)"*. The rule states that chapter 10.17 is applicable to all applications for foreclosure. The directive must be read in conjunction with the

amended rule 46A which came into operation on 22 December 2017. In every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required. The affidavit shall be attached to the Notice of Set Down. Where action proceedings have been instituted and the provisions of rule 31(5) are applicable, the registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court. The affidavit shall contain details of attempts made by the plaintiff to contact the defendant in order to negotiate terms of settlement to prevent foreclosure. The plaintiff must also, in the affidavit, provide the information referred to in rule 46A(5) and (9)(b).

8. The plaintiff's attorney filed such an affidavit:

8.1. Once again, the defendant's attention was drawn to section 26(1) and (3) of the Constitution and rule 46A of the Uniform Rules. She was advised that no writ of execution shall be issued against her primary residence unless a court having considered all the relevant circumstances, orders execution.

8.2. She was further advised that if she objects to the home being declared executable, she is to place facts and submissions

before the court to enable the court to consider them in terms of rule 46A(6)(a)(i) of the Rules of Court and that her failure to do so may result in an order declaring the defendant's home especially executable, consequent upon which the home may be sold in execution.

8.3. Paragraph 4.10 of the affidavit recorded that the defendant has multiple properties registered to her name, in support of which a report was attached reflecting a property registered in the defendant's name, being [redacted] Road, B[redacted].

8.4. In terms of rule 46A(5)(a) the market value of the property was stated to be R5 500 000.00. In support of this contention a report provided by a Professional Associated Valuer was attached. The local authority valuation of the property was stated to be R2 710 000.00 and the Win Deed valuation for an expected low was R4 070 000.00.

8.5. The total amount owing on the bond was R4 211 783.27 and the amount owed to the local authority for rates and taxes as at 3 October 2018 was R46 777.13.

8.6. The combined summons was served on a domestic worker at the mortgaged property, being [redacted] Avenue, B[redacted].

9. The chapter 10.17 affidavit was served on the defendant's attorneys on 23 November 2018. A few days later, on 29 November 2108, the defendant filed a supplementary affidavit stating that she wanted to submit information in accordance with rule 46(6)(a)(ii):

9.1. She confirmed that she was residing at [redacted] Avenue, B[redacted] with her family and that it was her primary residence.

9.2. She stated that she had no alternative accommodation for her and her family. She is the mother of two minor children age 2 years and 2 months respectively, who had become accustomed to living at the property and who consider same as their home. The eldest child attends school close to home while she attends to nursing the youngest child. In the circumstances it is not desirable for the property to be declared specifically executable.

9.3. In addition, she stated that the plaintiff failed to comply with rule 46A as the application to have the property declared

executable was not served upon her personally as was required by rule 46A(3)(d), nor did the plaintiff endeavour to obtain a court order authorising an alternative method of service.

9.4. Should the court should find that there was sufficient service, she claimed that the application was short served and that it did not comply with the periods referred to in rule 46A(4)(a)(ii) as read with 46A(4)(b).

9.5. In addition, she complained that the plaintiff's founding papers do not disclose the market value of the property. She stated that the plaintiff's papers do not refer to any evidence as to the amounts owing on the mortgage bond as is required by rule 46A(5)(c) and also that the plaintiff failed to attach evidence of any amounts owed to a local authority in terms of rule 46A(5)(d).

9.6. Finally, she stated that the plaintiff neglected to allege or attach evidence of any amounts owed in respect of levies or other charges as required in terms of rule 46A(5)(e).

9.7. The supplementary affidavit continued to set out a case for the court to exercise its discretion in terms of rule 6(5)(e) to allow the filing of the supplementary affidavit.

9.8. With reference to the recent full court judgment of 12 September 2018[1], she drew attention to the finding that the issue of liability and execution should be determined in one hearing as opposed to on a piecemeal basis. She thus requested that the supplementary affidavit be permitted as same brings relevant facts to the court's attention. She stated that the plaintiff would suffer no prejudice by the admission of the further affidavit and that it would permit the full ventilation and proper adjudication of the present matter.

10. During argument I indicated to counsel that the supplementary affidavit will be allowed. A defendant in an opposed application for summary judgment should not only put facts before court pertaining to the money judgment. Such a defendant is compelled to deal with the desirability of declaring the property executable or not, in addition to the money judgment. That it so, because following on the full court decision, the court hearing the application must decide both issues in one hearing. Although the particulars of claim dealt at length with the

[1] Absa Bank Ltd v Dokkie Kenneth Mokebe and other matters 2018/00612, per Tsoka, Pretorius et Wepener JJ.

plaintiff's reasons in support of the order of executability, the defendant did not deal with these issues when filing her affidavit resisting summary judgment.

11. The plaintiff's affidavit in terms of chapter 10.17 had to be filed together with the Notice of Set Down. It follows that when the defendant deposed to her affidavit resisting summary judgment, she could not deal with the averments contained in the chapter 10.17 affidavit. The procedure prescribed by the Practice Manual thus invites the filing of a supplementary affidavit in opposed matters. In such circumstances a court should allow the filing of a supplementary affidavit.

12. On behalf of the defendant Mr Scott submitted that the procedure adopted by the plaintiff should not be countenanced. He submitted that an application under rule 46A was necessary and that the affidavit filed in terms of chapter 10.17 was insufficient for the court to grant the order of executability. In his submission the chapter 10.17 was not properly before court in an application under rule 32.

13. Mr Scott's submission correctly identified an uneasiness between action procedure and a subsequent opposed application for summary judgment on the one hand, and the provisions of rule 46A on the other.

A plaintiff is fully within its rights to pursue an application for the money judgment and the order of executability in terms of rule 32, but rule 46A requires an application on notice of motion for the order of executability substantially in accordance with Form 2A of Schedule 1 (rule 46A(3)(a)). In addition, the Practice Manual requires the chapter 10.17 affidavit.

14. In my view the uneasiness is more apparent than real. A plaintiff pleading its cause of action in a combined summons is compelled to plead both circumstances entitling it to the money judgment and circumstances entitling it to an order of executability. Although the order of executability is ancillary to the money judgment, the latter relief forms an integral part of the cause of action.[2] It follows that when summary judgment is applied for and the cause of action is verified, the deponent verifies both the money judgment and the order of executability. The chapter 10.17 affidavit is a separate affidavit not falling foul of rule 32, which supports the relief sought in respect of executability. A court is eventually faced with a hybrid procedure requiring adherence to rule 32, rule 46A and the Practice Manual.

15. I do not read rule 46A as excluding a plaintiff's right to apply for summary judgment, nor that the plaintiff must institute a further

[2] Full Court judgment paragraph [12].

application under rule 46A in order to follow Form 2A. In my view the summary judgement application and affidavit filed in compliance with chapter 10.17 constitute substantial compliance by the plaintiff of its obligations contained in rule 46A. Together they allow the court to discharge its duties imposed by rule 46A and to strike a balance between the competing interests of the plaintiff and defendant in a matter where the executability of a primary residence is at stake. In this matter the defendant also availed herself of the opportunity to place a supplementary affidavit before court after receipt of the chapter 10.17 affidavit. In my view nothing would be achieved by insisting that the plaintiff should follow the motion procedure prescribed by rule 46A. All the information required by rule 46A is already before court.

16. In the premises I find that the plaintiff was fully entitled to apply for both orders in summary judgment proceedings in terms of rule 32. The summary judgment application, read with the affidavit filed in terms of chapter 10.17, constitute substantial compliance with the provisions of rule 46A. Rule 46A does not exclude action proceedings for an order declaring a primary residential property executable, but the requirements of rule 46A must still be complied with before the primary residence of the defendant can be declared executable.

17. I now return to the application for summary judgment. There is no reason whatsoever to dismiss the application because it was set down as a liquidation application and nothing more needs to be said about this. The notice to remove the cause of complaint had lapsed by the time when this application was heard. Besides, the affidavit resisting summary judgment did not claim prejudice by the manner in which the particulars of claim were drawn, nor did Mr Scott draw attention to any such prejudice. The contention that the summary judgment application should be dismissed because there is no such designation as *"Vice President"* cannot be upheld. Apart from the vagueness with which this allegation was made, the documents attached as "MVD" to the chapter 10.17 application contain such designation in their email address. The contention of a *bona fide* contractual mistake in relation to the second loan agreement can equally not be regarded as fully disclosing a *bona fide* defence. The existence of the first mortgage bond is not disputed, nor are the advances pursuant to the two loan agreements disputed. The issues raised as defences clearly indicate that a defendant without a *bona fide* defence is attempting to delay the inevitable. In my view summary judgment should be granted in respect of the money judgment.

18. An order of executability no longer automatically follows a money judgment. It is quite conceivable that a court reaches the conclusion

that a money judgment should be granted, but that it is of the view that the primary residence should not be declared executable, for example because of a paucity of information. In this matter the defendant could have been of more assistance. She could have confirmed her marital status and place of work. She could have disclosed her financial position, indicating her monthly income, possible joint income from her spouse and income from other assets.

19. Ms Bhabha for the plaintiff submitted that if I reached such a conclusion, I should nevertheless grant the money judgment. Given the full court's judgment, it is not clear to me whether such a plaintiff can approach a court for a second time under rule 46A to declare the very same property executable if new facts have become available. *Prima facie* this would appear possible to me, but it might have the effect of diluting the full bench's decision. On the other hand, the full bench has recognised a two-tier approach in matters concerning unsecured creditors. Once an unsecured creditor has executed against the movables, the full court held that it can approach a court in terms of rule 46A to obtain execution of an immovable property which is a primary residence.

20. I now turn to subrule 46A(2) to determine whether an order of executability can be granted. As already stated, the property in issue is

the primary residence of the defendant. There was no personal service of the defendant as required by subrule 46A(3)(d). The circumstances of this case indicate the subrule may safely be relaxed as the defendant got notice of this application in time to oppose it.

21. The defendant did not put up facts to indicate alternative means of satisfying the judgment debt. The plaintiff provided the information required by subrule 46A(5) relating to the market value of the property, the local authority valuation, the amounts owing on the mortgage bonds and the local authority. The property does not form part of a body corporate and no levies are due. The court can give effect to subrule 46A(8). I accept the plaintiff's contention that the debt owing to it cannot be satisfied by alternative means other than execution of the judgment debtor's primary residence. In the premises I must order execution in terms of subrule 46A(8)(d).

22. The full court has held that it is only in exceptional circumstances that a reserve price should not be set. The paucity of information provided by the defendant for the court to set a reserve price in terms of rule 46A(8)(e) and (9) was a cause of concern for me. I referred Mr Scott to paragraph [59] of the full court's judgment, which requires a defendant to place facts before the court. When I asked Mr Scott why the defendant did not provide more information and whether the defendant

claimed prejudice in relation to the procedure requiring a defendant to disclose facts relating to executability, whilst the money judgment is still being defended, his response was that I should approach the matter on the basis that the plaintiff had an onus to discharge. The defendant he stated, was not there to educate the plaintiff on how to comply with its obligations in terms of the rule. When a defendant fails to place facts before a court, the court is nevertheless bound to determine the matter without the benefit of the defendant's input. The valuations of the property reflect considerable value and in all likelihood the judgment debt and debt owed to the local authority will be extinguished by a sale in execution. In the premises I think it is fair to set the reserve price in the amount of the debt owed to the plaintiff.

23. In the premises I make the following orders:

23.1. Judgment is granted against the defendant in favour of the plaintiff in the amount of R3 835 238.56;

23.2. The defendant is ordered to pay interest on the aforesaid amount at the rate of 11.10% per annum and capitalised monthly, from 30 January 2018 to date of payment;

23.3. The following property is declared especially executable: Erf [redacted] B[redacted], Registration Division IR, the Province of Gauteng, measuring 4302 (four thousand three hundred and two) square metres, held by Deed of Transfer No [redacted], subject to the conditions therein contained;

23.4. A writ of execution in respect of the property referred to above is authorised;

23.5. A copy of this order is to be served on the defendant as soon as is practicable after this order is granted;

23.6. The defendant is advised that the provisions of section 129(3) and (4) of the National Credit Act, 34 of 2005 ("the NCA"), apply to the judgment granted in favour of the plaintiff. The defendant may prevent the sale of the property described above, if she pays to the plaintiff all the arrear amounts owing by her to the plaintiff together with all enforcement costs, default charges, prior to the property being sold in execution;

23.7. The arrear amounts and enforcement costs referred to above may be obtained from the plaintiff. The defendant is advised

that the arrear amount is not the full amount of the judgment debt, but the amount owing by the defendant to the plaintiff, without reference to the accelerated amount;

23.8. The defendant is further advised that the provisions of rule 46 and 46A of the Uniform Rues of the High Court apply to this order;

23.9. In terms of rule 46A(8)(e) the reserve price is set in the amount of R3 835 238.56;

23.10. The defendant is to pay the costs of suit on the attorney and client scale.

H VAN EEDEN
ACTING JUDGE

Counsel for applicant/plaintiff: Adv B Bhabha
Instructed by: Lowndes Dlamini Attorneys

Counsel for respondent/defendant: Adv T Scott
Instructed by: Schindlers Attorneys

Date of hearing: 6 and 7 December 2018

Date of judgment: 14 December 2018