



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

(1) REPORTABLE: YES/NO

(2) OF INTEREST OF OTHER JUDGES: YES/NO

(3) REVISED

DATE

SIGNATURE

CASE NO: 2019/14019

In the matter between:

ABSA BANK LTD

Applicant

and

TEBEILA N.O., TIMOTHY

First Respondent

NTWAMPIE N.O., MORWAMOCHÉ ANDREW

Second Respondent

MOKOU N.O., IMOGEN-FAITH MALIN

Third Respondent

**[in their capacities as trustees for the time being of
The MOLANGWANE TRUST (IT no 3775/2000)]**

TEBEILA, TIMOTHY

Fourth Respondent

JUDGMENT

Friedman AJ:

1 On 8 December 2010, the Molangwane Trust (“**the Trust**”) concluded an agreement with the applicant, Absa Bank Ltd (“**Absa**”), in terms of which Absa approved a facility of R28 million to enable the Trust to purchase residential property in Hurlingham, Johannesburg (“**the Hurlingham property**”). The relevant aspects of the agreement, for our purposes, are the following:

1.1 The agreement was essentially a mortgage agreement in respect of the Hurlingham property.

1.2 The debt in respect of the property was secured not only by the mortgage but by several suretyships, including one given by the fourth respondent (who was also one of the trustees of the Trust). In acting as a surety in terms of the agreement, the fourth respondent bound himself as surety and co-principal debtor jointly and severally together with the Trust in favour of Absa, for the repayment on demand of any sums which the Trust owed to Absa in terms of the agreement.

1.3 The agreement contained various general terms and conditions, which begin at page 002-61 of Caselines. These terms included the following:

1.3.1 An “event of default” was defined to include the failure of the borrower to make any payment to Absa on the due date.

1.3.2 The agreement provided that, if the borrower failed to rectify an event of default within 2 business days of having been given notice, then all of the borrower's indebtedness became due and payable "forthwith" and Absa was entitled to demand and claim payment of all of the sums due or deemed to be due and to exercise its rights under any securities.

2 Absa says that the Trust breached the agreement by failing to keep up with its monthly payments. On 27 September 2018, Absa's attorneys wrote to the first respondent and recorded that the home loan account was in arrears in the amount of R1 222 260.35. In an email dated 2 October 2018, the fourth respondent acknowledged that the account was in arrears and said that he was awaiting a large payment – thus implying that the arrears would be settled once the payment came in.

3 In terms of the relevant clauses of the agreement which I have discussed above, as soon as the trust defaulted on its payments and did not rectify the default in two business days, the entire balance of the sum owed in terms of the facility became due and payable and the bank was entitled to claim it.

4 Absa attached a certificate of balance to its founding affidavit, which demonstrates that, as of 19 March 2019, the full outstanding balance on the facility (which, as a result of the Trust's default, is due and payable) is R24 115 129.62. The primary relief initially sought by Absa was an order that the three Trustees of the Trust (ie, the first to third respondents), and the fourth

respondent as one of the sureties in respect of the agreement, are liable to pay Absa that sum plus interest as calculated in terms of the agreement. As I explain below, that relief has now been modified slightly.

- 5 The respondents have filed an answering affidavit and have raised various defences, which may properly be described as technical. They have not, however, meaningfully disputed the core contentions of Absa – ie, that the full amount of the loan became payable as soon as default was not cured within two business days.

- 6 On the morning of the hearing, the respondents unilaterally uploaded a practice note and short heads of argument onto Caselines. This is, of course, impermissible in terms of the rules set out in the Practice Manual of this division. I take the view, however, that documents of that nature are primarily there to assist the Court, and so I see no purpose in adopting an unduly technical approach to the matter, especially because Absa's counsel did not object. In the exercise of my discretion on procedure, I allow the filing of those documents.

- 7 In the heads of argument, counsel for the respondents focused exclusively on the right to housing (ie under section 26 of the Constitution) and rule 46A of the Uniform Rules. I return to discuss those matters below. The respondents' heads of argument do not address the merits, other than to record that the respondents do not deny being indebted to Absa. It is noted in the heads of argument that the respondents have tendered to pay a lower monthly

instalment to discharge their debt. In the light of the provisions of the agreement which I described above, Absa is not obliged to accept that tender.

- 8 There is, accordingly, no basis to refuse the primary relief sought. In *Rossouw v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) at para 48, in the context of a summary judgment application, the SCA held that it was useful for the certificate of balance to be handed up at the hearing of the matter. This is now reflected in paragraph 10.17(4) of the Practice Manual of this Court. Absa has attached a current certificate of balance to its affidavit demonstrating compliance with the Practice Manual (which appears at folder 041 of Caselines). On taking an instruction, Ms Acker for Absa confirmed that Absa seeks an order to reflect the updated certificate of balance. That is an appropriate order to make in the circumstances.
- 9 Absa also seeks an order declaring the Hurlingham property to be executable. Although the principal debtor is the Trust, the fourth respondent, in binding himself as a surety, also rendered himself the co-principal debtor. He lives in the Hurlingham property with his family. In my view, that renders rule 46A applicable. As I have said, the respondents have filed an answering affidavit in this matter. They declined to place any facts before the Court in that affidavit to assist the Court in the exercise of its discretion under rule 46A, saying simply that they would seek leave to file a supplementary affidavit in due course to deal with the matter. This was not done.

- 10 In my view, courts, when exercising a discretion in terms of rule 46A, should be robust and apply common sense (within reason, of course). If the principal debt and value of the property is relatively small, courts should be astute to ensure that the interests of the debtor in his or her residential property are properly taken into account and that all avenues to avoid execution have been explored. They should do this, even if the matter is not opposed (even, if necessary, by asking that the debtor be present in court to address the court orally) and even if the matter is opposed but the answering affidavit is not a model of clarity. Judgment debtors, having fallen on difficult times, often do not have the wherewithal to brief competent attorneys and so courts might often have to step into the breach and ensure that justice is done.
- 11 In a case such as the present, the considerations are different. The judgment debt sat at roughly R24 million in 2019 and now sits at more than R32 million. Absa, in its founding affidavit, values the property at anywhere between R10 million and R43 million. The respondents deny this valuation, but notably they say that it is *higher*, not lower than this. And, in the answering affidavit, the fourth respondent referred to various major pending business deals which he said would enable him to settle the claim in due course. In the practice note filed by his counsel, presumably on his instruction, reference is made to an offer by the fourth respondent to pay R300 000 per month to settle the respondents' indebtedness. In making this offer, the fourth respondent makes clear that he is a businessman with substantial means. *Ms Acker* submitted on behalf of Absa that there was no prospect that the fourth respondent and his family would be rendered homeless if the Hurlingham property is declared

executable. I agree. In the absence of compelling information to the contrary (which, for instance, could have been presented in the supplementary affidavit which the respondents promised, but failed, to file), it has to be assumed that a person with the fourth respondent's means would be able to find alternative accommodation.

- 12 This is not the only consideration in rule 46A. The court must also consider alternative ways in which the debtor might be able to discharge the debt. In the answering affidavit, which was filed in 2019, reference was made to the prospect of the fourth respondent being able to settle the respondents' indebtedness from funds received from a mining agreement on behalf of Sekeko Resources (a company of which he is a director and another one of the sureties) which he was, at that time, apparently in the process of concluding. He also referred to payment expected from a company of which his wife is the sole director, which he said would assist the Trust in settling the claim. The difficulty is that here we are, three years later, and the outstanding amount of Absa's claim now sits at around R32 million. This implies that these deals fell through or failed to generate sufficient funds. It is not for me to speculate about that. The respondents undertook to file a supplementary affidavit to update the Court on matters relevant to rule 46A. Their failure to do so leaves me in a position where I have to assume that there are no alternative mechanisms available to the respondents to settle their indebtedness.

- 13 The same applies to the question of execution against movables. *Mr Modisenyane*, who appeared for the respondents (and put up a valiant effort in

the circumstances; and particularly taking into account that he was briefed two days before the hearing) submitted that there is no evidence on the papers that Absa sought to execute first against the respondents' movable property before seeking the order which it now seeks in respect of the Hurlingham property. The starting position which any reasonable observer would take in this matter is that execution against movable property would be an inadequate mechanism to discharge an indebtedness of roughly R32 million. But, of course, this may not always be so – one can imagine very valuable movable property that might be available in some circumstances. But, again, it was not in my view Absa's responsibility to waste time going down that road. If there was a genuine prospect of the debt being discharged in this way, the respondents ought to have presented facts to substantiate that assertion.

14 To be clear: it is not my finding that rule 46A does not apply to this matter because the value of the residential property is high. It applies in all cases where the property is the home of the judgment debtor. But, in a case such as this, where the value of the debt is very high, the value of the property is very high and the prima facie indications are that the debtor would be able to afford to rent alternative accommodation, there is an obligation on the debtor to put up facts to aid the court in the exercise of its discretion. The respondents' failure to do so means that I have to assume that there are no reasons, relevant to the enquiry under rule 46A, for me not to grant the orders which Absa seeks.

15 *Mr Modisenyane* quite reasonably accepted that there was insufficient information on the papers to enable me to conclude that there were meaningful

alternatives to execution against the Hurlingham property to settle the respondents' indebtedness. While acknowledging that there was no formal postponement application before me, he asked me to exercise my discretion under rule 46A(8) to postpone the matter and call for more evidence. Part of his basis for making this request was his submission that there is a risk of homelessness and that it would be appropriate to call for more information to address this issue. As I have already explained, there is simply no basis to be concerned that there is a risk of homelessness given the means of the fourth respondent. The respondents have, in my view, had long enough to place information before this Court and it would not be in the interests of justice to delay this matter any further. Not only am I satisfied that there is no risk of homelessness, but I have no reason to believe that there is any meaningful alternative to the order sought by Absa to enable the respondents to discharge their obligations to it.

- 16 The agreement provides that, if Absa is required to incur legal costs in order to preserve its rights under the agreement, it is entitled to costs on the attorney-client scale. It must therefore be awarded costs on that scale in these proceedings.

ORDER

- 17 I accordingly make the following order:

- 1. The respondents are obliged to pay to the applicant, jointly and severally, the one paying the others to be absolved, the sum of R32 483 269.97 together with interest thereon calculated at the rate of prime less 0.5% per annum calculated daily and compounded monthly in arrears from 6 October 2022 to date of payment.**

- 2. The following property is declared specially executable for the amounts to which reference is made in paragraph 1 above: ERF 151 Hurlingham Township, registration I.R, the Province of Gauteng Measuring 2483 square meters Held by Deed of Transfer no. T147300/05 subject to the conditions therein-contained.**

- 3. The Registrar of this Court is authorised to issue a writ of execution against the immovable property referred to in paragraph 2 above and as envisaged in Rule 46(1)(a).**

- 4. The respondents are to pay the costs of this application on the attorney and client scale.**

**ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 29 November 2022.

APPEARANCES:

Attorney for the applicant: Cliffe Dekker Hofmeyr

Counsel for the applicant: L Acker

Attorney for the respondents: Musekwa HT Incorporated

Counsel for the respondents: T Modisenyane

Date of hearing: 23 November 2022

Date of judgment: 29 November 2022