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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE: 02 SEPTEMBER 2022	AJ THUPAATLASE

Case No: 18251/2021

In the matter between:

First National Bank **Plaintiff**

And

Mucabel Pearl **Defendant**

Id No. […]

Judgment

Thupaatlase AJ

Introduction

"*The value and protection afforded to the home have been captured in several well-known maxims such as: 'a man's home is his castle'; 'home is where the heart is'; and safe as houses. These maxims encapsulate the ideology that a home is much more than a mere object. Most individuals are emotionally attached to their homes and loss of such asset can be severely detrimental to a person's*

well-being. Naturally it is accepted that reasonable efforts should be taken to avoid such deprivation, and several laws have provided protection for the home or to the right to have access to adequate housing[1]."

Background

[1] This is an application in terms of Rules 31(5)[2]; 46 (1) (ii)[3] and 46(A) (8)[4].The Applicant issued summons against the Respondent for cancellation of loan agreement and payment of the amount of R 686 000.00 as result of the Defendant falling into arrears in her bond repayment. Despite the fact that these proceedings started as action procedure following issuing of summons, the parties will for ease of reference be referred to as cited in the motion proceedings for default judgment and ancillary orders.

[2] The Respondent was properly served and did not enter an appearance to defend. She has, however made a point that whenever the matter is enrolled, she appears unrepresented to fend off attempts to obtain judgment against her.

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[1] C Singh "To foreclose: Revealing the 'cracks' within the residential foreclosure process in South Africa" 2019 SA Merc LJ 147

[2] (5) (a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for debt or liquidated demand, file with the registrar a written application for judgment against such defendant; Provided if the application is for an order declaring the residential property specially executable, the registrar must refer such application to the court.

[3] (1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until-
(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that where the property sought to be attached is the primary residence of the judgment debtor. no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.

[4] (8) A court considering an application under this rule may-

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b) order the furnishing by-

(i) a municipality of rates due to it by the judgment debtor; or

(ii) a body corporate of levies due to it by the judgment debtor;

(c) on good cause shown, condone-

(i) failure to provide any document referred to in subrule (5); or

(ii) delivery of an affidavit outside the period prescribed in subrule (6)*(d)*;

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

[3] It is perhaps apt at this early stage of the judgment to sketch the history of this matter in order to understand the context. In 2015 the Applicant and Respondent entered into a home loan agreement whereby the Applicant advanced to the Respondent the sum of R 635 000.00 as capital amount. There were other fees added to the capital amount. These included additional fees to cover all interest, charges for legal fees and any damages suffered by the lender. The capital amount added to R 762 000.00. At 12.6% interest rate the total payable amount totalled R 1 771 552.19. The monthly instalment was calculated at R 7 324.19 over 240 months period.

[4] The Respondent fell into arrears and on the 12 February 2021 the Applicant caused a letter contemplated by section 129 of the National Credit Act, 2008. The letter called upon the Respondent to cure her default within ten (10) days. The Respondent was invited to discuss possibility of making a firm arrangement to bring the arrears up to date. The letter was sent by registered mail.

[5] In addition the Applicant's attorneys also sent an email to the same effect with the section 129 letter attached on the 12 February 2021.By her email dated 17 February 2021, the Respondent replied and expressed surprise that there was threat of a legal action against her. At that time the arrear amount was R 36 000.00.

[6] The Applicant subsequently issued summons on the 07 April 2021 which was served on the Respondent on the 29 April 2021. The summons was served at the chosen *domicilium citandi executandi*. The Respondent was in terms of the computation of *dies* provided by the Rules required to enter a Notice of Intention to Defend in terms of Rule 19 by the 13 May 2021[5] and a Plea by the 10 June 2021 in terms of Rule 22[6]. She failed to respond as required by the rules.

[7] As result of the failure to respond to the summons, the Applicant approached court to a default judgment for monetary judgment and in addition for order to

[5] (1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney: Provided that the days between 16 December and 15 January, both inclusive, shall not be counted in the time allowed within which to deliver a notice of intention to defend.

[6] (1) Where a defendant has delivered notice of intention to defend, he shall within twenty days after the service upon him of a declaration or within twenty days after delivery of such notice in respect of a combined summons, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out.

declare the residential property specially executable. This is the property that is the subject matter of the loan agreement.

[8] The application was set down for hearing on the 21 September 2021. A Notice of Motion was served on Respondent, and she appeared in person. The court postponed the matter *sine die* and the Respondent was afforded opportunity to pay off the arrears within a period of six months from the date of the order. At that stage the arrears amounted to R 43 747.35.

[9] In the event that arrears were not paid within the set timeframe, the Applicant was granted leave to supplement the application and set it down for hearing. In addition, the Applicant was granted leave to serve such supplementary affidavit and notice of set down by email. The Respondent was ordered to pay costs on a punitive scale of attorney and client scale.

[10] On the 10 May 2022 the matter was again set down for hearing and again the Respondent appeared in person and the matter was removed from the roll as the date on the draft order was found to be incorrect. It is worth noting that even at that stage the Respondent appeared in person and that there were no opposing papers filed.

[11] The Applicant again set down the matter for hearing on the 02 August 2022 hence this judgment. The Applicant again seeks the prayers similar to that of September 2021 and May 2022. The application is based on the contention that the Respondent has failed to defray the arrears as per court order and remains in arrears.

[12] In support of the application for money judgment in terms of Rule 31 and order for executability, a comprehensive affidavit was submitted. The Notice of Motion was duly served on the Respondent, and she appeared in person on the day of hearing. She did not file a notice to oppose or opposing affidavit.

[13] When the matter was called the counsel for the Applicant and argued that application be granted, and that the appearance of Respondent was a mere tactic to frustrate the Applicant from obtaining a relief it is entitled to by law. The Respondent was allowed to address the court. She maintained her position that the bank was been unreasonable in dealing with her.

[14] At the time of hearing the arrears had increased to R 51 851.55. It is clear that the Respondent has failed to pay arrears.

[15] The affidavit accompanying this application provides a detailed account of the numerous instances where the Applicant has tried to contact the Respondent to rectify her default. The Respondent has not taken advantage to make an acceptable arrangement. It is obvious that the only time she responds to the Applicant is when the matter is set down for hearing in court.

[16] In granting a postponement the court on the on 21 September 2021 was following on the practice of this division. The salutary practice is an endeavour to place the Respondent in a position to settle the arrears and to secure the bonded property. In ***FirstRand Ltd t/a First National Bank v Zwane and Two Others***[7] it was held that "*a court faced with an application by a mortgage lender for (i) default judgment for accelerated full balance of the mortgage loan; (ii) an order declaring the mortgaged property executable would, if the mortgaged property were the debtor's primary residence, have a discretion to postpone both applications to afford the debtor the opportunity to pay the arrears''.*

[16] It is abundantly clear that the Respondent was on numerous occasions granted opportunity to remedy her default and has failed to honour her undertakings to do. In the meantime the arrears have continued to accelerate.

The Law

[17] The first issue relates to whether the Applicant is entitled to a money judgment. As pointed out at the beginning of this judgment, the claim of the applicant is based on a breach of a home loan agreement secured by mortgage bond. There is no plea filed on behalf of the respondent. The Applicant is therefore entitled to approach the court for a default judgment. I am satisfied that the applicant is entitled to such relief.

[18] The second issue and the more difficult one is around the issue of executability of the immovable property. The court has to be satisfied that Rule 46A requirements have been met before such order can be granted. The Rule 46A gives meaning to Section 26 of the Constitution. The issue implicates constitutional rights.

[7] 2016 (6) SA 400 (GJ) at 404A

[19] Rule 46A provides for judicial oversight, the aim of which is to protect the constitutional right to adequate housing provided in section 26 of the Constitution[8]. The rule list several steps that needs to be taken into consideration to grant an appropriate relief. The court is required to investigate alternative means of satisfying the judgment debt. The rule is only applicable where execution creditor wants to execute against a residential property.

[20] In ***ABSA Bank Ltd v Njolomba and Other Cases***[9] the court stated that '*There have, of late been a salutary move in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without the judicial oversight being brought to bear thereon and the recent introduction of Rule 46A into the Uniform Rules which requires that the Court "consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence. The cases have required stringent adherence to notice and service requirements and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to Rule 46 of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor's circumstances and the value of the property. This assists in setting appropriate reserve price and other sale conditions in the event of execution against property becoming necessary. However, the process has, as its aim endeavour, to maintain the mortgage loan and [sic] rehabilitate the debtor if at all possible."*

[21] The above quoted passage summarizes and captures the essence of the state of our law and the same has been recognized by the Rules Board in enacting Rule 46A. There is clear recognition that constitutional protection must be afforded where they are being implicated.

[8] 1) Everyone has a 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 realisation of this right.
[9] 2018 (5) SA 548 (GJ) at 550-551C

[22] The full bench of this division has held ***ABSA Bank Ltd v Mokebe and Related Cases (Mokebe)***[10] stated that *"The postponement of the money judgment is both desirable and necessary and is to be heard together with the question of executability, should any part of the matter be postponed*." The court went to state as follows "*Having decided that piecemeal hearing of applications for foreclosure are undesirable and not cost effective, the issue of granting money judgments separately from the order of executability, does not arise*[11]*."*

[23] In ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*** (***Jaftha***)[12] the following is said "*Another difficulty is that there may be other factors which militate against a finding that execution is unjustifiable. Such factors will vary according to the facts of each case. It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature"*

[24] The judgment of ***Jaftha***[13] *supra* continued that *"The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process".*

[25] *In* ***Gundwana v Steko Development and Others (Gundwana)***[14]*)* the court stated that *"An agreement to put one's property at risk as security in a mortgage bond does not equate to a licence for the mortgagee to enforce execution in bad faith. I conclude that the willingness of mortgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cases beyond the reach of Jaftha. An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's*

[10] 2018 (6) SA 492 at para [33]
[11] Mokebe footnote 10 at para [47]
[12] [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para [41]
[13] Jaftha footnote 10 at para [42]
[14] [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC at paras [48] and [49]

home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not the registrar".

Application of facts to the law

[26] The decision in ***Mokebe*** has settled the approach that court should adopt. The decision as already discussed also encapsulates the approach of the decisions of ***Jaftha*** and ***Gundwana***. The approach is that the court should not deal with the matter in a piecemeal fashion and that there should be judicial oversight. This is to ensure that the constitutional imperatives enshrined in Section 26 of the Constitution are considered. The decision must also take account of the considerations enumerated in Rule 46A (8).

[27] It is important to note that Rule 46A does not prohibit or outlaw execution against primary residence. The order of execution against immovable property can be ordered if there is no other satisfactory means of satisfying the judgment debt. The Rule also provides for alternatives, for example a setting of the reserved price and also postponement of the application on such terms as the court may consider appropriate.

[28 It is trite that the Constitution of South Africa provides for justiciable socioeconomic rights, and this includes the right to have access to adequate housing which is enshrined in s 26 of the Constitution. The underlying rationale of rule 46A is to impose procedural rules to give effect to that fundamental right. Rule 46A must therefore be interpreted purposively against the backdrop of s 26 of the Constitution, which grants access to housing.

[29] In this case the Respondent has already benefitted from the alternative of a postponement and despite such indulgence, she still failed to remedy her default. As stated in ***Gundwana*** 'the interests of the creditor' should also be considered. A further alternative that has been stipulated by the rule is 'setting of a reserve price'. The arrear amount is continuing to increase including municipal rates. The costs which were awarded on the 21 September 2021 were on a scale of attorney and client scale. These costs will also increase the indebtedness of the Respondent.

[30] The conduct of the Applicant cannot be characterized as malicious. The Applicant has afforded the Respondent opportunity to bring her arrears up to date

without any success. It is clear that the Respondent is unable to meet her obligations in terms of loan agreement. A further postponement of this matter will be the prejudice of both the Applicant and the Respondent. The Respondent will continue to attract a higher indebtedness.

[31] The setting of a reserve price seeks to protect the debtor by ensuring that homes are not sold for extremely low prices. In case of ***Petrus Johannes Bestbier and Others v Nedbank Limited***[15] the SCA stated as follows regarding Rule 46A stated that "*the aim of rule 46A is to assist the Court in considering whether the s 26 rights of the judgment debtor would be violated if his/her house is sold in execution. Rule 46A contains procedural prescripts, not substantive law. The requirement of judicial oversight in s 26 of the Constitution must be viewed in light of South Africa's history of forced removals and racist evictions during apartheid and the need to protect security of tenure of all South Africans"*

Conclusion

[32] Having considered the matter and all factors that were placed before the court I am of the view that default judgment be granted in favour of the Applicant and that to ameliorate the hardship that the Respondent may endure, that a reserve price be set. It is my considered view that postponing the matter further will not serve the interests of any of the parties in this matter. As indicated above the arrears have continued to rise since the litigation started.

[33] In setting the reserve price the court had regard to the market value of the property, which according to the Applicant is about R 780 000.00, the municipality evaluation of the property which is R 606 000. The amount owing as rates and taxes which is currently about R 15 579.77. The reserve price has been set at 70% of all outstanding amounts quoted herein.

Judgment is granted against the Respondent, in the following terms:

1. Payment of the sum of R631,293.19;
2. Interest on the aforesaid amount at the rate of 10.35% per annum, calculated daily and compounded monthly, from 25 February 2021 to date of payment, both days inclusive;

[15] (Case No. 150/2021) [2022] ZASCA 88 (13 June 2022) at para [20]

3. An order declaring ERF […] COSMO CITY EXTENSION 7 TOWNSHIP, REGISTRATION DIVISION I.Q., THE PROVINCE OF GAUTENG, MEASURING 280 (TWO HUNDRED AND EIGHTY) SQUARE METRES held by the Defendant under deed of transfer T25174/2015 executable for the said sum.

    1. that the property referred to in (3) above may be sold by the sheriff of the High Court subject to a reserve price of R 469 520. 00; and

    2. if the reserve price is not achieved at the first sale in execution, then and in that event, the property referred to in (3) above may be sold by the sheriff of the High Court at any subsequent sale in execution to be held on a different day to the highest bidder without a reserve price;

4. Costs of suit on an attorney and client scale;

5. The Registrar of this court is directed to issue a writ of attachment to enable the Sheriff to attach the aforesaid property, in satisfaction of the judgment debt, interest and costs.

6. The Respondent is advised that the provisions of Section 129(3) and (4) of the National Credit Act, 34 of 2005, apply to the judgment granted in this matter. The Respondent may prevent the sale of the property as aforesaid if they pay to the Applicant all of the arrear amounts owing by the Respondent to the Applicant together with all enforcement costs and default charges prior to the property being sold in execution.

7. The arrears amounts and the enforcement costs referred to in paragraph (6) above, may be obtained from the Applicant. The Respondent is advised that the arrear amount is not the full amount of the judgment debt, but the arrear amount owing by the Respondent to the Applicant, without reference to the accelerated amount.

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Thupaatlase AJ

Date of Hearing: 02 August 2022

Date of Judgment: 02 September 2022

APPEARANCES:

Plaintiff: Charl Cilliers Inc.

Defendant: In person