

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2019/14019

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

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A. FRIEDMAN

9 APRIL 2024

In the matter between:

TEBEILA N.O., TIMOTHY

First Applicant

NTWAMPIE N.O., MORWAMOCHÉ ANDREW

Second Applicant

MOKOU N.O., IMOGEN-FAITH MALIN

Third Applicant

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

TEBEILA, TIMOTHY

Fourth Applicant

and

ABSA BANK LTD

Respondent

In re:

ABSA BANK LTD

Applicant

and

TEBEILA N.O., TIMOTHY

First Respondent

NTWAMPIE N.O., MORWAMOCHE 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
(LEAVE TO APPEAL)**

FRIEDMAN AJ

- [1] On 29 November 2022, I handed down judgment in an application brought by Absa Bank Ltd (“**Absa**”) to enforce payment in terms of a credit agreement concluded with the applicants for leave to appeal (who, to retain consistency with my judgment on the merits, I shall describe below as “**the respondents**”) and to declare executable the immovable property which was purchased with the credit advanced by Absa. In the discussion below, I shall refer to my judgment in the original proceedings as “**the merits judgment**” and all relevant papers and issues relevant to the original proceedings as “**the merits founding affidavit**”, the “**merits answering affidavit**”, “**the merits proceedings**” and so on.
- [2] I do not intend to repeat anything said in the merits judgment here. This judgment should be read together with that one and the discussion below assumes familiarity with the merits judgment.

APPEARANCE BY THE RESPONDENTS

- [3] This application for leave to appeal has taken close to 18 months to be heard. As far as I can see from previous correspondence, it was scheduled to be heard in around June or July 2023, but was removed from the roll. *Ms Acker*, who appeared for Absa (as she did in the merits proceedings), informed me that Absa has made multiple efforts to have this application for leave to appeal heard because the respondents failed to take the necessary steps to set it down.

- [4] When the matter began at 9h30 on the date reflected in the notice of set down (8 April 2024), there was no appearance for the respondents. The Registrar made efforts to locate them and, in due course, the respondents' attorney, *Mr Raphela*, appeared. He informed me that, despite the notice of the hearing having been sent to the same email addresses (two of them) used by his firm since they came on record in this matter, nobody at his firm received them. Email correspondence is now the default method of communication used by the Registrars of this Court to communicate with parties. The email addresses used by the Registrar to inform the parties of the hearing date and time are the same addresses provided by Mr Raphela's firm in its notice of appointment dated 21 June 2023. I was informed both by the Registrar and the legal representatives of Absa that one or both of these addresses had previously been successfully used to communicate with Mr Raphela's firm. In these circumstances, I informed *Mr Raphela* that I had no reason to disbelieve him when he said that he did not receive notice of the hearing, but that I would have to proceed on the basis that the hearing date was properly brought to the respondents' attention.
- [5] I have to acknowledge, and make no apology for doing so, that I was influenced in my desire to bring finality to this matter by my view, which I shared with *Mr Raphela*, that the application for leave to appeal, as reflected in the notice filed by the respondents on 15 December 2022, bears no prospects of success. I should emphasise that I would not have been willing to proceed with the hearing had I been in any doubt that the respondents were given proper notice. However, since I had no doubt, and since this matter demands finality, I considered it to be essential to proceed.
- [6] *Mr Raphela*, quite fairly, did not dispute that, given that the notice had been properly brought to the respondents' attention (even if they say that, as a matter of fact, they did not receive it), it would be appropriate for me to proceed to determine the matter. He placed the relevant facts (relating to the respondents' claim that they did not receive notice of the hearing) before Court, but then left it at that. I informed the parties that I intended to give a brief judgment dealing with each of the grounds on which the application for leave to appeal is based as reflected in the notice of application for leave to appeal. I undertook to explain, as I attempt to do below, my reasons for concluding that an appeal would bear no prospects of success. *Mr Raphela* accepted this, and undertook to inform his clients of the outcome in due course. I am grateful to him for making the effort to join the hearing and for adopting a sensible approach in the circumstances.

ABSA'S HEADS OF ARGUMENT

[7] In the hearing of the application for leave to appeal, *Ms Acker* alerted me to the fact that she had uploaded heads of argument to Caselines. I confessed that, in my preparation, I had overlooked them. I have considered them as part of formulating this judgment, and I am grateful to her for having taken the effort to assist me by providing them.

THE GROUNDS

[8] The grounds in the application for leave to appeal are the following (I summarise robustly, to avoid repetition):

- 8.1. I did not apply rules 46 and 46A of this Court's rules (relating to execution against immovable property) correctly, primarily for failing to set a reserve price (but also, if I understand correctly, for letting Absa get away with non-compliance with these rules).
- 8.2. I failed to make a finding in terms of section 83 of the National Credit Act 34 of 2005 ("**the National Credit Act**") that the credit agreement was reckless credit.
- 8.3. I failed to ensure that Absa complied with section 129(1), read with section 130, of the National Credit Act.
- 8.4. My order is "unconstitutional" because "it was unconstitutional for Absa to apply to attach the Respondent's [sic] property and the registrar would be precluded to order attachment [sic]".

[9] I deal with each one briefly below.

RULES 46 AND 46A

[10] This proposed ground of appeal links to the argument of the respondents that my order was unconstitutional. I deal with that below. For the reasons given in that section of the judgment, I am satisfied that the respondents bear no prospects of success in overturning my order on any basis related to their constitutional rights. In this section, I focus briefly on the arguments advanced by the respondents about the application of the detailed requirements of rule 46A.

- [11] It remains something of a mystery as to what aspects of my application of rule 46A in the merits judgment are said by the respondents to have been wrong. My failure to set a reserve price is specifically raised in the application for leave to appeal. But, beyond that, no specific non-application of the rule is identified. In the merits answering affidavit, the respondents alleged that there was non-compliance with rule 46A(3)(d), which requires personal service of an application to declare immovable property executable unless the court orders that service may be effected in another matter. Their contention in the merits answering affidavit, as far as I understand it, was that they were prejudiced by alleged non-compliance with the rule. This, apparently, because the merits application “was only issued on 16 April 2019” and they needed more time to obtain valuation reports to deal with the issue of an appropriate reserve price. The answering affidavit was filed about 7 weeks after the merits application was launched. Given the timeframes provided in rule 6 of the Uniform Rules, I do not understand this complaint.
- [12] But, in any event, there is no doubt that the respondents had proper notice of the proceedings and exercised their right to oppose the application. I referred in the merits judgment to the supplementary affidavit which the respondents undertook to, but did not, file. They had more than ample time to do so (their answering affidavit was filed in June 2019 and I heard argument in the merits application in November 2022), and to the extent that they seek to link their failure to do so to an allegation that there was not personal service as contemplated rule 46A(3)(d) (which is how the point was framed in the merits answering affidavit), it is an attempt which must fail. I accept that, in some circumstances, formalities must be applied uniformly, regardless of their purpose. But the service requirement in rule 46A(3)(d) is designed to protect the interests of judgment debtors to ensure that all necessary steps are taken to bring an application under rule 46A to their attention. Since judgment debtors will often, at least by the time that a rule 46A application is brought, have fallen on hard times, most (I hypothesise) rule 46A applications are determined in unopposed court. That being so, proper service is essential. It strikes me as opportunistic for a respondent in an opposed application to seek to make something of (alleged) lack of compliance with rule 46A(3)(d) (or other service and notice provisions).
- [13] The remaining focus placed by the respondents on compliance with rule 46A gives rise to the issues which I addressed in the merits judgment. Flowing from the reasoning in that judgment, I do not consider the respondents to have reasonable prospects of success on appeal in relation to this ground.
- [14] On the issue of a reserve price, *Ms Acker* quite correctly pointed out, in her heads of argument, that the courts retain a discretion as to whether to set a reserve price in terms of rule 46A(8)(e) of the Uniform Rules. The intention in

setting a reserve price is to prevent the debtor from being prejudiced by a sale for substantially less than the true value of the property, leaving the debtor with no home and a significant debt still to repay. In this case, Absa placed detailed information as to the property's value before Court in its founding affidavit. Although the respondents intimated that its value was higher than reflected in Absa's valuations, they failed to take the opportunity to place any facts relevant to this issue before Court. This despite expressly reserving the right to do so in the merits answering affidavit. Importantly, Absa understandably did not press for the setting of a reserve price, and the respondents did not raise the issue in their merits argument at all. In these circumstances, I do not consider there to be a reasonable prospect of an appeal court setting aside my merits order on the basis that I failed to provide for a reserve price.

RECKLESS CREDIT

[15] The simple reason why this ground cannot succeed is that the respondents did not plead, in their merits answering affidavit, that the credit agreement constituted reckless credit as contemplated by sections 80 to 83 of the National Credit Act. In my view this is dispositive of the argument. This is because there are vital facts which the Court needs to know to determine whether sections 80 to 83 apply. A striking example is whether an assessment was done in terms of section 81(2), and, if so, whether Absa satisfied itself that the respondents understood the agreement. Other factual matters flow from sections 80(1) and 80(2) of the National Credit Act. Had the respondents pleaded reliance on these provisions, Absa would have had an opportunity to place facts before this Court to refute (if possible) the respondents' reliance on section 83. Not only was this issue not pleaded, it was not argued during the merits proceedings. It escapes me how it can be raised for the first time in the application for leave to appeal, untethered from any factual jetty. There is simply no evidence in the record on which an appeal court could overturn my order on the basis that the credit agreement is impeachable under sections 80 to 83 of the National Credit Act.

SECTIONS 129 AND 130

[16] In the merits founding affidavit, Absa pleaded that it had complied with the requirements of sections 129(1) and 130 of the National Credit Act by giving proper notice of the application to the respondents. In the respondents' answering affidavit (ie, on the merits), they denied that Absa had complied with section 129 of the National Credit Act.

[17] In Absa's replying affidavit, Absa argued that the National Credit Act did not apply to the credit agreement. However, essentially as an alternative

argument, it comprehensively demonstrated that it had complied with sections 129(1) and 130 of the National Credit Act before launching the merits proceedings. I do not wish to make this judgment any longer than necessary by summarising Absa's detailed explanation of its compliance (which included annexing proof). I shall simply note that I could have been left in no doubt that there was compliance.

- [18] I say "could have been" because, in their merits heads of argument and in the proceedings before me on the merits, the respondents did not press the section 129 argument at all. It may well have been that, having seen Absa's response in its replying affidavit, it was decided by their counsel not to press the point. I need not speculate. The simple position is that there is no reasonable prospect that an appellate court will uphold the section 129 argument.

UNCONSTITUTIONAL ORDER

- [19] Since this is a leave to appeal judgment, of interest only to the parties (at best), I do not intend to spend much time explaining why this last ground has no merit. There are scores of judgments of our courts dealing with the interaction between rule 46A of the Uniform Rules and the right to housing in section 26 of the Constitution. I can do no better than to repeat the recent explanation given by Moultrie AJ, in *Nedbank Ltd v Mabaso* 2023 (2) SA 298 (GJ) at para 11, that the purpose of rule 46A is to "achieve an appropriate balance between the legitimate commercial rights of judgment creditors to payment and the equally legitimate rights of indigent debtors to housing under s 26 of the Constitution". And I agree (with respect) wholeheartedly with his point, made in the same paragraph of the judgment, that if the application of rule 46A "presents a court with an opportunity to address an inappropriate imbalance that has emerged between the competing rights of the parties, that opportunity must be seized".

- [20] I do not want to repeat what I said in the merits judgment on the application of rule 46A and the substantive question of whether it would be appropriate to order execution on the facts of the case. In my view (and it is always invidious to cast judgement on one's own reasoning), the merits judgment reflects an appropriate balancing of the various interests, taking into account, in particular, what was pleaded. I made the point in the merits judgment that I expressly did not make a finding that section 46A did not apply at all – ie, I did not make a finding that there was some sort of threshold (relating to the value of a debtor's home), above which the protection fell away. Everything turned, rather, on the balancing of the interests envisaged by the rule. There can be no scope for finding that my order is "unconstitutional". There is also no scope for the direct application of section 26 of the Constitution (or section 25, for

that matter – which I mention because the respondents refer to it in their application for leave to appeal). Rather, rule 46A is meant to give effect to the Constitution by ensuring that the right in section 26 is adequately protected. The wrong application of the rule by a judge is not “unconstitutional”. It is simply wrong and, accordingly, appealable. In this case, though, I am satisfied that there is no prospect of an appeal court finding that I misapplied rule 46A.

CONCLUSION AND COSTS

[21] It follows from what I have said above that the application for leave to appeal should be dismissed.

[22] For the same reason as given in paragraph 16 of the merits judgment, Absa is entitled to costs, in the application for leave to appeal, on the attorney-client scale.

[23] I accordingly make the following order:

1. The application for leave to appeal under the above-mentioned case number is dismissed.
2. The applicants for leave to appeal (respondents in the main proceedings) are to pay the costs of the application for leave to appeal on the attorney-client scale.

A. FRIEDMAN
Acting Judge of the High Court
Gauteng 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. The date for hand down is deemed to be **9 April 2024**.

Heard: 8 April 2024
Judgment: 9 April 2024

Appearances:

**For Applicants for leave to appeal:
Attorneys for the Applicant:** Mr NI Raphela (attorney)
Raphela Attorneys Inc

**For Respondent:
Attorneys for Respondent:** Ms L Acker
Bowman Gilfillan Inc