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
8 SEPT 2022
DATE

[redacted]
SIGNATURE

CASE NO: 2021/1525

In the matter between:

SAWINDU 08 RF (PTY) LTD
(Registration no: 2013/222429/07) **Applicant**

and

MACHEDI, SECHABA **First Respondent**

LENKWATI, GUGU **Second Respondent**

JUDGMENT

FRIEDMAN AJ:

1 In this application, the applicant issued summons for the repayment of the sum of R796 618.34 and interest, and an order declaring certain residential property to be executable, arising from a loan extended by the applicant to the

respondents to enable them to buy the property. After the respondents failed to enter an appearance to defend, the applicant brought an application for default judgment.

2 The default judgment application came before Opperman J on 6 June 2022 and, as I understand the position, the respondents either appeared in person or briefed legal representatives to appear on their behalf to record an intention to oppose the matter. Opperman J granted an order:

2.1 Postponing the application *sine die.*

2.2 Ordering the respondents to file an answering affidavit, if any, on or before 27 June 2022.

2.3 Ordering that, should the respondents fail to file an answering affidavit by 27 June 2022, the applicant will be entitled to enrol the matter on the unopposed roll.

2.4 Ordering the respondents to pay the wasted costs of the postponement on the attorney and client scale.

3 No answering affidavit was filed by the respondents on or before 27 June 2022.It follows from Opperman J's order that, as of 28 June 2022, the applicant became entitled to set the default-judgment application down on the unopposed roll. The applicant did so, which is how the matter came before me on 6 September 2022.

4 On 28 July 2022, after the applicant took steps to set the matter down on the unopposed roll, attorneys acting for the respondents emailed an answering affidavit and plea to the attorneys representing the applicant. No condonation application accompanied the answering affidavit. The applicant's attorneys responded by email to record that they did not accept service of, inter alia, the answering affidavit. They took the view that without a formal condonation application, the affidavit could not be treated as having been properly served and that unless a condonation application was brought, the applicant intended to proceed to seek default judgment (and an order declaring the property executable) on 6 September 2022.

5 No condonation application was filed but the answering affidavit was uploaded onto Caselines either the day before the hearing on 6 September 2022 or on the morning of the hearing. When the matter was called on 6 September 2022, counsel appeared for the respondents and argued that, since the matter was now opposed, it should simply be removed to the opposed roll. Counsel for the applicant argued that the respondents had been given a warning, more than a month earlier (a reference to the 28 July 2022 email from the applicant's attorneys responding to the attempt by the respondents to serve the answering affidavit), that a condonation application ought to be brought. Counsel argued that the failure to do so was contemptuous of Opperman J's order of 6 June 2022. She argued that no legitimate answering affidavit was now before court and that

the matter should proceed on an unopposed basis as envisaged by Opperman J's order.

6 The founding affidavit in the default judgment application records that the property is used for residential purposes, but that the applicant is unable to confirm whether the property is the primary residence of the respondents. I appreciate that it is technically cheating for me to consider the contents of the answering affidavit when it is disputed by the applicant that it is properly before court, but I note that in the answering affidavit the first respondent records that the property is his primary residence.

7 Rule 46A of the Uniform Rules imposes a duty on judges considering applications to declare property to be executable to consider whether there are alternative means for the judgment debtor to satisfy the judgment debt – ie, a mechanism other than execution. I therefore reserved judgment in the application to allow myself a short period of time to consider what to do.

8 I do not intend to transform this judgment into a treatise on the caselaw relating to section 26 of the Constitution (ie the right to housing). That caselaw is hopefully now well-known. The judgment of the Constitutional Court in *Jaftha v Schoeman* 2005 (2) SA 140 (CC) ushered in a new era and it is now necessary for all courts to take seriously the need to consider all relevant factors – and, as now envisaged by rule 46A, proper alternatives – before permitting a home of a person to be executable. I am mindful of the order made by Opperman J. Furthermore, the applicant's counsel argued very persuasively that the answering affidavit is not properly before court. She is, of course, technically correct. But courts are never to be slaves of procedure and especially in cases such as this, courts must be robust so that the right to housing in section 26 of the Constitution is properly protected. If the respondents bring a properly-motivated condonation application, they may be able to persuade a court to admit their answering affidavit. And, once the answering affidavit is admitted, it remains possible that the respondents will be able to resist default judgment and defend the trial action. The plea has been uploaded onto Caselines and, in it, the respondents say that they have attempted to enter into a debt review process under section 86 of the National Credit Act 34 of 2005. I do not wish to enter the merits of that issue at all, but it suggests to me that there may be ways to avoid execution.

9 Ultimately, the discretionary issues raised by the procedural issues in this case seem to me to engage an enquiry akin to assessing the balance of convenience. The loan agreement between the parties provides for attorney-client costs. It may be that I afford one final opportunity to the respondents to file a condonation application, and make a costs order, but they fail to carry through. If that happens, then on the next occasion when this matter comes before court, the applicant will get its order and will not, in the scheme of things, have suffered much prejudice. On the other hand, if I take a strict approach to the answering affidavit and adopt the applicant's proposal of treating this matter as remaining unopposed – as it no doubt would be permissible for me to do – it gives rise to the possibility that

the respondents will lose their home when this could have been avoided. This is not, in my view, appropriate.

10 I therefore intend to make an order which facilitates the filing of a condonation application by the respondents. This will enable them to motivate for the admission of the answering affidavit and open the door to them opposing the action which seeks to declare their property executable. I intend to make provision for the matter to be re-enrolled on the unopposed roll if they fail to do so.

11 The applicant's counsel argued that I should make a costs order on the opposed scale. There is merit in that proposal given the history of this matter, but I do not want to pre-empt the possibility of the respondents being able to give a cogent explanation, in their condonation application, for the dilatory manner in which the proceedings have thus far been conducted (by them). People of all walks of life are suffering financially in this country at the moment, and there may be a series of reasonable explanations for the fact that the respondents were only able to procure legal assistance at the last moment. I shall therefore make provision for the costs to be taxed on an opposed basis if the condonation application is not brought within the timetable reflected in my order.

12 It is difficult to make an order which reflects my intention that this should be the last chance given to the respondents to comply with the rules of Court, without constraining the discretion of any other courts which are seized of this matter in due course. But it is hoped that this message is received clearly by the respondents.

ORDER

13 In the light of the above, the following order is made:

1. The application for default judgment under case number 2021/1525 is postponed sine die.

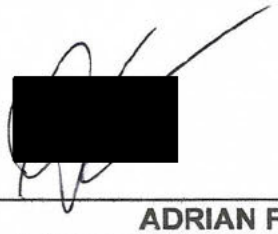
2. The respondents are to file a condonation application, if any, in which they seek the admission of their answering affidavit dated 28 July 2022 by no later than 22 September 2022.

3. In the event of the respondents complying with the order in paragraph 2 above, the applicant may file an answering affidavit opposing the condonation application in terms of the time-period envisaged in rule 6(5)(d)(ii) of the Uniform Rules. Thereafter, the ordinary rules shall apply.

4. In the event that the respondents fail to file a condonation application by 22 September 2022, the applicant may enrol the default judgment application on the unopposed roll.

5. In the event that the respondents fail to file a condonation application by 22 September 2022, the respondents are to pay the costs of the postponement on 6 September 2022 on the attorney-client scale, taxed on the basis that the matter is opposed.

6. In the event that the respondents file a condonation application on or before 22 September 2022, the costs of the postponement on 6 September 2022 are reserved.



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

Date of hearing: 6 September 2022

Date of judgment: 8 September 2022