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

Case nr: 037065/2023

(1) REPORTABLE:YES/NO	
(2) OF INTEREST TO OTHER JUDGES:YES/NO	
(3) REVISED: YES/NO	
_____	15 May 2024
Signature	Date

In the case between:

SB GUARANTEE COMPANY (RF) PROPRIETARY LIMITED **Applicant**

and

ROSE MOSIMA LESHIKA
Identity number: 8[…] **Respondent**

JUDGMENT

VAN ASWEGEN AJ

INTRODUCTION:

[1] In this matter the Applicant seeks judgment against the Respondent in the following terms: -

1.1 Confirmation of cancellation of the agreement.

1.2 Payment in the sum of R5 184 063.33.

1.3 Interest on the sum of R5 184 063.33 at the rate of prime plus 0.14% per annum from 22 FEBRUARY 2023 to date of payment, both dates inclusive, together with monthly insurance premiums of R2 043.63.

1.4 That the immovable property described as:

PORTION […] OF ERF 2[…] DAINFERN EXTENTION 3[…] TOWNSHIP, REGISTRATION DIVISION J.R., PROVINCE OF GAUTENG, in extent:
440 (FOUR HUNDRED AND FORTY) SQUARE METERS Held by Deed of Transfer Number T5788/2019 and subject to subject to the conditions as set out in the aforesaid Deed is declared specially executable.

1.5 The registrar is authorised to issue a writ of execution in terms of Rule 46 as read with 46A for the attachment of the Property.

1.6 Costs of suit on the attorney and client scale

[2] The contractual matrix involved can be set out as follows:

2.1 On or about 5 February 2018, the Respondent and the Standard Bank of South Africa Limited ("SBSA") entered into a home loan agreement ("loan agreement").

2.2 Pursuant to the conclusion of the loan agreement, the Respondent caused to be registered over the property in favour of the Applicant a continuing covering mortgage bond registered under bond number **B4075/2019 (**"the mortgage bond").

2.3 The Applicant as security for the loan concluded a written guarantee (the Common Terms Agreement)) in favour of SBSA, in terms of which, *inter alia*, the Applicant guaranteed the due and punctual payment of all sums now and subsequently due by a debtor (who has

borrowed money from SBSA pursuant to a home loan agreement) to SBSA ("Guarantee").

2.4 The Respondent was required by the Applicant, and also as security for the loan to conclude a written indemnity agreement on 5 February 2018 in terms of which, *inter alia,* the Respondent (as borrower) indemnified and held the Applicant harmless from and against all loss, costs, expenses and liabilities which the Applicant may suffer in connection with SBSA and the Guarantee ("Indemnity Agreement").

[3] The Applicant accordingly pursues a securitized claim, relying on the provisions of a written indemnity agreement (read with the provisions of a mortgage bond) granted in its favour by the Respondent, which agreements formed part of a suite of agreements between the Applicant, the Respondent and SBSA.

[4] The Respondent has breached the loan agreement in that she has failed to pay the monthly amounts due in terms thereof and as at 20 January 2023 the arrear amount owing was **R141 564.99**. After SBSA complied with the relevant default procedures, it elected to cancel the loan[1] and call upon the Applicant to perform in terms of the Guarantee.[2]

[5] The Respondent opposes the application on the basis that the loan issued by SBSA to the Respondent constitutes reckless lending in violation of the National Credit Act 34 of 2005 (NCA). The counter application is also based upon reckless lending.

[6] The Respondent alleges that an affordability assessment was not conducted by SBSA and that the absence thereof constitutes reckless lending.[3]

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[1] 002-127 to 002-147
[2] 002-150
[3] 007-19

[7] The Respondent also opposes the execution of the property in question being her primary residency, based on her right to adequate housing as protected by section 26 of the Constitution of the Republic of South Africa,1996.

CONSIDERATION OF DEFENCES:
RECKLESS LENDING BY SBSA

[8] The Respondent alleges that there was contravention of section 81(2) of the National Credit Act, 34 of 2005 (NCA) in that SBSA engaged in reckless credit rendering the lending invalid.

[9] In Section 1 of the NCA reckless credit is defined as credit granted to a consumer under a credit agreement concluded in circumstances described in section 80.

[10] In terms of section 80(1) of the NCA a credit agreement is reckless if:

10.1 at the time that the agreement was made, or at the time when the amount approved in terms of the agreement is increased, the credit provider failed to conduct an assessment as required by section 81(2), irrespective of what the outcome of such an assessment might have concluded at the time.

10.2 The credit provider, having concluded an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that:

10.2.1 the consumer did not generally understand or appreciate the consumer's risk, costs, or obligations under the proposed credit agreement, or

10.2.2 entering into that credit agreement would make the consumer over- indebted.

[11] The Respondent's advocate argued that SBSA did not conduct a thorough assessment to determine whether the loan had to be granted.

[12] The assessment documents upon which SBSA relied to grant the loan are Annexures **RA4.1**[4] and **RA4.2.**[5] The Respondent argued that **RA4.1** – the loan application could not have been used for SBSA's assessment as it is dated 5 February 2018 whilst the loan was issued prior to the said date on 10 January 2018[6]. This is incorrect. Although the loan was issued in January 2018 it was only signed in February of the same year. Annexure **RA4.2** is a FNB assets and liabilities questionnaire in SBSA's possession. Although the banks differ – FNB opposed to SBSA - the court has no evidence as to how it came to be in SBSA's possession.

[13] The Respondent alleges that her financial position was unhealthy at the time when SBSA did the affordability assessment. She bases this allegation upon a credit record indicating a judgment of **R28 108.00** granted in 2017. The Respondent also states that other banks declined her a loan as they were dissatisfied with her credit record.

[14] The Respondent indicated that the statement of account issued by the Applicant revealed itemized charges such as legal costs and garden fees.

[15] The Respondent stated that an assessment should have been done having regard to the Respondent consumer's existing means, prospects, and obligations. Only a reasonable assessment would have complied.[7]

[16] The test for a consumer's indebtedness is set out in section 79(1) of the NCA:

> 16.1 the preponderance of available information at that time that a determination is made indicates to the credit provider that the consumer will be unable to satisfy all the obligations under all the credit agreements to which he or she is a party.

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[4] 008-40
[5] 008-44
[6] FA2 002-46
[7] ABSA Bank Limited v De Beer and Others 2016 (3) SA 432 (GP) par 60

[17] The Respondent alleges that if SBSA had conducted an affordability assessment the Respondent's credit record would have become known. This is a reality that ought to have been considered. If an assessment was done and it was found that a credit record existed, it would amount to reckless lending.

[18] In terms of section 79(1) the question is not whether the consumer is unable to satisfy her obligations but rather whether the consumer will be unable to satisfy them in a timely manner.

[19] Clause 8.1.1 of the Code of Banking Practice 2012 further mandates banks to extend credit in a responsible manner that matches the consumers borrowing requirements and financial capacity. Clause 8.1.4 allows for an assessment of the consumer's ability before extending credit.

RIGHT TO ADEQUATE HOUSING:

[20] The Respondent also relies upon her constitutional right to housing. She states that the property is her primary residency and that she and her dependents have no other alternative housing in the event of executability.

[21] In terms of Section 26 of the Constitution of the Republic, 108 of 1996 everyone has the right to have access to adequate housing. The respondent states that she along with her dependents would be deprived of access to adequate housing which would be a violation of the constitution.

[22] The respondent accordingly relying upon:

i) SBSA's alleged failure to do an affordability assessment and

ii) the respondent's right to adequate housing in terms of the constitution seeks a dismissal of the application and to declare the lending to be reckless lending in violation of the NCA and the Code of Banking Practice.

EVALUATION OF THE RESPONDENT'S DEFENCE:

[23] Having regard to the document titled Acceptance by the Borrower, in the Home Loan Agreement clauses 1.8, 1.9, 1.15 and 1.18, the following words are written and were signed by the respondent on 5 February 2018 at Sandton:

> "1.8 *I/We have fully and truthfully, disclosed my/our income and expenses to the Bank and have fully and truthfully answered all requests for information made by the Bank, leading up to the conclusion of this Agreement.*
>
> *1.9 I/We have disclosed complete and authentic documentation to the Bank to enable the Bank to conduct an affordability assessment.*
>
> *1.15* Accepting and entering into this Agreement will not cause me/us to become over-indebted *as contemplated in the NCA:*
>
> *1.18 I/We are aware that I/We must not accept this Agreement unless I/We understand my/our rights and obligations and the risks and costs of the Loan*."

[24] it is not disputed that the respondent supplied the applicant with information which enabled the applicant to determine whether the respondent qualified for credit or not. The affordability assessment was therefore undertaken based upon all information provided to SBSA by the respondent.

[25] The respondent also made available a confirmation letter by Semo and Associates - Accountants and Business Consultants in which they declared that they were the duly appointed accountants of Rose Leshika Occupations Therapy. They further confirmed that the respondent earned a monthly salary of **R200 000.00** per month from her practice.[8] The respondent's financial statements for February 2016 were also attached.[9]

[26] SBSA accordingly granted the loan based upon the documentation provided by the respondent.

[27] It is also of the utmost importance to take note of the fact that the loan was granted in 2018 and that the respondent only five and a half months later wants to rely on rand plead reckless lending.

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[8] 008-45
[9] 008-47

[28] In *SA Taxi Securitisation (Pty) Ltd v Mbhata and Two Similar Cases*[10] it was held that to demonstrate reckless credit, the respondent should have provided some particularity concerning the following:

28.1 details should have been given of the negotiations leading up to the conclusion of the agreement.

28.2 to the extent that the respondent's wish is to avail herself of section 80(1)(b) of the National Credit Act 34 of 2005 the respondent should have provided information demonstrating her level of education and experience at the time relating to the risk of incurring credit.

28.3 details of all of the respondent's indebtedness at the time that the agreement was concluded.

28.4 information should have been provided concerning the respondent's current level of indebtedness and income and expenditure to enable the court to evaluate whether the court might, in the exercise of its discretion, set aside the credit agreement or suspend it.

[29] In this matter the respondent an educated occupational therapist failed to:

29.1 address the negotiations leading up to the conclusion of the loan agreement.

29.2 provide details of her financial position at the time when the agreement was concluded; and

29.3 to provide any details of her current financial information to enable the court to exercise its discretion.

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[10] 2011(1) SA 310 (GSJ)

[30] Despite the inadequacy of the detailed information sought by a court the defence of reckless credit must however also fail due to the fact that the Applicant is the entity *SB Guarantee Company (RF) Proprietary Limited* and not SBSA and the cause of action relied on is the enforcement of an indemnity[11] and not the breach of a home loan agreement secured by a mortgage bond.[12] It must further be highlighted that the Applicant is a separate and distinct entity from SBSA. The said entities bear different registration numbers.

[31] The respondent furthermore confirmed that the indemnity was fully explained to her and that she fully understood her rights and obligations and the risks associated with the indemnity. She also acknowledged that she had been given an opportunity to secure independent advice in respect of the contents of the indemnity. In addition, she acknowledged that neither the guarantor nor SBSA induced, harassed, or forced her to enter into the indemnity. [13]

[32] The said indemnity was furthermore co-signed by the applicant and the respondent on the 5th of February 2018.[14]

[33] It is also clear from the indemnity[15] that the respondent shall be and shall remain bound to the full extent of the indemnity which at all times shall be fully and immediately enforceable, despite any unenforceability, illegality or invalidity of any obligations of the respondent or any other persons under the loan agreement or security agreements. The invalidity of the loan agreement therefore has nothing at all to do with the indemnity.[16]

[34] it is of the utmost importance to note that SBSA is not a party to the proceedings. The defence of reckless lending is not a defence to the Applicant's claim which is based on the enforcement of the indemnity agreement. There is a distinct difference between a cause of action dependent upon a loan agreement

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[11] 002-75
[12] 002-46
[13] 002-78
[14] 002-78
[15] 002-76
[16] Clause 3.7.1 002-76

secured by a mortgage bond as opposed to the enforcement of the indemnity agreement.

[35] Accordingly, the defence of reckless credit is not one which can assist the respondent in the enforcement of the indemnity agreement. Such a defence must fail.

[36] In the absence of a bona fide and enforceable defence it is evident that judgment must follow.

EXECUTABILITY OF THE IMMOVABLE PROPERTY:

[37] I shall now deal with the executability of the immovable property which the Applicant seeks to satisfy the respondent's indebtedness to it.

[38] It is undoubtedly so, that foreclosure of the immovable property, which is the primary residence of a respondent, has a major impact on the rights contained in section 26 (1) of the Constitution: the right to have access to adequate housing.

[39] However, *in Absa Bank Ltd v Petersen*[17] it was held that where an order of execution is sought against a judgment debtor's home that is mortgaged to a bank, the proper methodology is to give effect to the mortgage bond, unless something makes it inappropriate to do so, having regard to all the relevant circumstances of the case.

[40] In *Gundwana v Steko Development and Others*[18] the Constitutional Court held:

> *"[W]here execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must*."

[17] 2013 (1) SA 481 (WCC) on page 494 to 496
[18] 2011 (3) SA 608 (CC) at para [41]

[41] Rule 46(A) deals with the procedural rules for executing a judgment debt against residential immovable property. The rule focuses on two main aspects:

i) determining if it is justified to sell the debtor's home in execution and,

ii) if a sale is ordered, setting a reserve price at which the property is to be auctioned.

[42] In *Firstrand Bank v Folscher*[19] the court listed an extensive range of factors that could be considered when deciding whether a writ should be issued. Nevertheless, the court was careful to note, at paragraph [41], that not each and every factor had to be taken into account for every matter; rather, the enquiry had to be fact-bound to identify the criteria that was relevant to the case in question.

[43] The right to have adequate housing is enshrined in Section 26 of the Constitution. The authorities have accepted that the underlying purpose of rule 46A is to impose a procedural rule to give effect to the right to adequate housing as envisaged by the Constitution.[20] It is now well established that the execution of immovable property by a judgment creditor has to be done with the court's oversight.

[44] It is common cause in the present matter that the property is the respondent's primary residence. She was alerted to her rights in terms of section 26(1) of the Constitution in the Notice of Motion. The Respondent is an occupational therapist at Rose Leshika Occupations Therapy and earns an income of **R200 000.00** per month from her practice.[21] Her monthly expenses amount to **R38 493.00** which leaves her with an amount of **R161 507.00** for repayments.[22] She should on this basis have been able to pay the monthly instalment of approximately **R46 776.72**[23] The respondent will further been able to secure alternative accommodation for herself and her two sons based upon these figures.

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[19] 2011 (4) SA 314 (GNP).
[20] *Petrus Johannes Bestbier and Others v Nedbank Limited* (Case No. 150/2021) [2022] ZASCA 88 (13 June 2022).
[21] 008-45
[22] 008-41
[23] 008-13

[45] As at **20 January 2023** the Respondent was in breach of the loan agreement by failing to pay the monthly instalments and the arrear amount owing was **R141 564.99.**[24]

[46] In the present matter, the Respondent regularly breached the home loan agreement by failing to make payment in terms thereof. SBSA has repeatedly attempted to assist the Respondent to regularise the arrears position under the Loan Agreement, as is borne out by the following, inter alia:

46.1 SBSA has placed various telephone calls to the Respondent to discuss bringing the Respondent' arrears under the Loan Agreement up to date.

46.2 SBSA communicated with the Respondent via e-mail to determine.whether the parties could agree on a suitable payment arrangement.

46.3 SBSA's attorneys attempted to reach a payment arrangement with the Respondent.

46.4 The Respondent liquidated the arrears whereafter the Respondent again regularly breached the agreement.

46.5 During or about April 2021 the Respondent again fell into arrears with her home loan repayments.

46.6. During / about June 2021, various communications ensued between the Applicants' Attorney of record and the Respondent to reach a settlement. No settlement could however be reached.

46.7. During or about 2021 the Applicant instituted legal action against the Respondent under case number 31285/2021 which application was opposed by the Respondent. Judgment was granted but thereafter the

[24] 002-27

> Respondent paid all the arrears. Subsequently the Respondent once again fell in arrears.

[47] The Respondent accordingly continuously fell into arrears and failed to keep up to date with her monthly instalments. The applicant cancelled the home loan agreement with effect from **17 June 2021**. Despite the said agreement being cancelled as aforesaid the Respondent once again dispatched cancellation notices via email and registered post to the respondent.[25]

[48] As of 22 February 2023 the respondent was indebted to SBSA under the loan agreement, and therefore to the applicant under the indemnity, in the amount of **R5 184 063.33** together with interest at prime plus 0.14% per annum from 22 February 2023 to date of final payment, both dates inclusive.[26]

[49] On or about 28 June 2021 SBSA notified the Applicant that the Respondent was in breach of the home loan agreement and that the applicant was required to discharge all of its obligations to SBSA in terms of the applicant's guarantee, by proceeding under the indemnity by calling up and foreclosing on the mortgage bond and enforcing such other remedies as were available to the applicant in law.[27]

[50] In terms of a valuation report obtained by the applicant the municipal value of the immovable property is **R5 200 000.00.** The market value of the said property is **R6 800 000.00,** and the forced sale value is **R5 000 000.00.** [28] The rates and taxes outstanding in respect of the property amount to **R324 192.87**.[29]

[51] Regarding the question of executability of the property it is important to note the following remark by the Constitutional Court in *Gundwana v Steko Development CC and Others*[30]:

> "*It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality*

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[25] FA11 to FA20
[26] FA15
[27] FA16
[28] 002-153
[29] 002-163
[30] 2011 (3) SA 608 (CC) at para [54]

between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."

[52] Having taken all the factors placed before me into account, I am of the view that the application in terms of rule 46A should be granted in favour of the applicant. To ameliorate any hardship that the respondent may endure, I shall set a reserve price.

[53] No submissions were made by the respondent regarding the values pertaining to the immovable property. I shall accordingly rely on the values pertaining to the property as provided by the applicant.

[54] In calculating the reserve price I take cognizance of the market value, municipal value, and the outstanding amount in respect of rates and taxes as set out in para [51] here in above. I accordingly set a reserve price of **R5 000 000.00.**

[55] I accordingly make the following order:

55.1 The cancellation of the home loan agreement dated 5 February 2018 is confirmed.

55.2 The Respondent is ordered to make payment in the sum of **R5 184 063.33**.

55.3 Interest in the sum of **R5 184 063.33** at the rate of prime plus 0.14% per annum from 22 FEBRUARY 2023 to date of payment, both dates inclusive, together with monthly insurance premiums of R2 043.63.

55.3.1 The immovable property described as:

PORTION […] OF ERF 2[…] DAINFERN EXTENTION 3[…] TOWNSHIP, REGISTRATION DIVISION J.R., PROVINCE OF GAUTENG, in extent 440 (FOUR HUNDRED AND FORTY) SQUARE

METERS Held by Deed of Transfer Number T5788/2019 and subject to such conditions as set out in the aforesaid Deed, is declared specially executable.

55.4 The Registrar is authorised in terms of Rule 46 as read with rule 46A to issue a writ of attachment for the attachment of the Property;

55.5 A reserve price is set at **R5 000 000.00.**

55.6 The Respondent's counterclaim is dismissed;

55.7 The Respondent is ordered to pay the costs on the attorney and client scale.

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 15 May 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10h00 on 15 May 2024

S van Aswegen
Acting Judge of the High Court,
Johannesburg

APPEARANCES:

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