

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Maluka and Another (2022-015043) [2023] ZAGPJHC 1157 (16 October 2023) [2023] ZAGPJHC 1157

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

2022-015043

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)

Case

No. 2022-015043

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

16.10.23

In the matter between:

ABSA
BANK LIMITED
Applicant
And
DEBORAH
DIMAKATSO MALUKA
First
Respondent
RAND
WEST CITY MUNICIPALITY
Second
Respondent

JUDGMENT**WILSON J:**

1 The applicant, ABSA, seeks leave to execute on a mortgage debt owed to it by the first respondent, Ms. Maluka. ABSA wishes to do so by selling Ms. Maluka's modest home in Toekomsrus, near Randfontein. The debt secured against that property is just over

R170 000. The instalments due on the home loan the mortgage bond secures are just under R1830 per month.

2 On 5 October 2023, I refused ABSA leave to execute against Ms. Maluka's home. I postponed ABSA's application to do so to Tuesday 6 February 2024. I directed Ms. Maluka to make four monthly payments to ABSA, each in the sum of R2200, on or before the last day of each month between October 2023 and January 2024. I indicated that I would give my reasons for making that order in due course. These are my reasons.

3 A court asked to give leave to execute a debt against a person's home must be satisfied that there are "no other proportionate means" to secure the payment of the debt (*Gundwana v Steko Development* 2011 (3) SA 608 (CC), paragraph 54). The proportionality inquiry embraces a wide range of circumstances, many of which this court enumerated in *First Rand Bank v Folscher* 2011 (4) SA 314 (GNP) (see, especially, paragraph 41 of that decision).

4 In this case, a relatively small debt is secured against the modest home of an obviously impoverished debtor. Execution in these

circumstances is plainly inappropriate if there is any other realistic prospect that "the debt might yet be paid" (*Standard Bank of South Africa v Saunderson* 2006 (2) SA 264 (SCA), paragraph 20).

5 Ms. Maluka, who appeared in person before me, offers the prospect that she may yet be able to pay the debt secured against her home. She says that she is entitled to a pension from the South African Police Services (SAPS), which will yield monthly payments of around R2500. She has had some difficulty negotiating the bureaucracy surrounding the way those pension payments will be structured, but confidently expects that the first monthly payment due will be made this month, in October 2023. Ms. Maluka plans to use almost all of those monthly payments to service the debt secured against her home.

6 I see no reason not to give Ms. Maluka the opportunity to try to clear her arrears and make good on her obligations to ABSA in this

way. Ms. Maluka readily agreed to an order directing her to make monthly payments in the sum of R2200. Although I have nothing under oath from which I can infer that Ms. Maluka will receive a pension, and that she is likely to be able to make the payments she says she can make, it seems to me that the best evidence of Ms. Maluka's ability to stave off execution would be a record of payment consistent with her undertakings. There is no suggestion that ABSA would be unduly prejudiced by the delay entailed by allowing Ms. Maluka the opportunity to try to establish that

record.

7 Accordingly, I postponed the application for leave to execute for four months in order to give Ms. Maluka the opportunity to demonstrate that she can actually make the payments she has promised. On the face of things, those payments exceed the monthly instalments that are due on the home loan, and will, it seems, make a meaningful contribution to the arrears on the home loan while at the same time paying the interest due and reducing the capital amount secured.

8 It will be for the Judge seized with the matter on 6 February 2024 to decide whether Ms. Maluka's prospects of servicing the

debt in this way are realistic. If they turn out not to have been, that Judge may well decide that execution is proportionate at that stage. But the question before me was whether, in light of all the facts, it was proportionate to allow this creditor to take away this debtor's home at this time. For the reasons I have given, that result would plainly have been disproportionate.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 16 October 2023.

HEARD ON: 5 October 2023

DECIDED ON: 5 October 2023 REASONS: 16 October 2023

For the Applicant:

K Boshomane

Instructed by

Lowndes Dlamini Attorneys

For the First Respondent:

In person

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