

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Mokone (24509/2022) [2025] ZAGPPHC 104 (31 January 2025) [2025] ZAGPPHC 104

COURT

North Gauteng High Court, Pretoria

BEFORE

Ellis AJ

CASE / FILE NUMBER

24509/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

Case

Number: 24509/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 31/01/2025
SIGNATURE
FIRSTRAND
BANK LIMITED
Plaintiff
and
TEBOGO
BATISTA GEORGE MOKONE
Defendant
This
judgment was prepared and authored by the Judge whose name is
reflected herein 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 on CaseLines.

JUDGMENT

ELLIS AJ

1. On 11 March 2024, having heard argument in an opposed summary judgment application and Rule 46A application, I made the following order:
 1. Payment of the sum of R2 161 872.42 (TWO MILLION ONE HUNDRED AND SIXTY-ONE THOUSAND EIGHT HUNDRED AND SEVENTY-TWO RANDS AND FORTY-TWO CENTS);
 2. Payment of interest on the above amount at the rate of 8.75% (EIGHT POINT SEVEN FIVE) percent per annum calculated and capitalised monthly in advance in terms of the mortgage bond, from the 20/02/2022 until date of payment.
 3. An order declaring the Defendant's Immovable property;
ERF 1[...] B[...] EXTENSION 113 TOWNSHIP
Registration Division I.R
Province of GAUTENG
Measuring 357 (THREE HUNDRED AND FIFTY-SEVEN) Square Meters
Held by Deed of Transfer No. T32696/2014
(Situated at UNIT 1[...] V[...] C[...], 1[...] E[...] ROAD, BARTLETT EXTENSION 113) mortgaged under Mortgage Bond No. B[...] to be specially executable for the said sum plus costs.
4. The Registrar is authorised to issue a Warrant of Execution for the attachment of the Defendant's Immovable property.
5. The Sheriff of the above Honourable Court is authorised to execute the Warrant of Attachment.

6. The immovable property to be sold at auction at a set reserved price of R1 725 578.10.
7. Costs on the scale as between party and party.
8. The execution of this order is suspended for a period of 3 (three) months from the date of this order.
9. The Defendant's attention is drawn to the provisions of section 129(3) and (4) of the National Credit Act, 34 of 2005: In terms of this section, Defendant is entitled to reinstate the agreement by paying to the credit provider all overdue amounts (this is the rear amount on the instalments and not the full balance outstanding), together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied. Such payment is to be made before any sale in execution of the subject property to revive the credit agreement.
2. The reasons for my aforesaid order follow hereinbelow.

REASONS:

3. Plaintiff's cause of action is premised on a loan agreement and mortgage bond concluded between the parties in 2014. As at date of summons, the arrears on the bond account were an amount of R154 057.86 representing 6.75 months.
4. Defendant does not dispute the conclusion of the loan agreement, registration of the mortgage bond, the terms of both the agreement and the mortgage bond as well as the arrears on the bond account.
5. It is trite that a defendant in a summary judgment application should advance his or her defence with sufficient degree of clarity in order to enable the court to ascertain whether he or she has deposed to a defence which, if proved at trial, would constitute a good defence to the action^[1] and with reference to the plea that was delivered.^[2]
6. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*,^[3] the Supreme Court of Appeal discussed summary judgment proceedings and held as follows:

"[31] ... the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

- ^[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure that first, an examination of whether there has been sufficient disclosure

by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learner judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

- [33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and/or 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G-426E.”[4]
6. Defendant in his plea and affidavits filed in opposition to the summary judgment application and Rule 46A application, essentially raised the following defences, namely:
- 6.1 that Defendant and his dependants' right to housing in terms of section 26 of the Constitution will be infringed, as the mortgage property is their primary residence;
- 6.2 that Plaintiff failed to comply with the provisions of section 129 of the National Credit Act 34 of 2005 (“NCA”) as Defendant never received the section 129 notice and as such Defendant was unable to respond to or act in terms of such notice;
- 6.3 that there are alternative and satisfactory remedies available, other than execution and/or declaring the property specially executive, to recover the monies owing.
7. The defences raised by Defendant must therefore be analysed in order to determine whether they are bona fide and good in law.

First Defence: Section 26 of the Constitution

8. It is trite that the Constitution of South Africa provides for justifiable socio-economic rights and this includes the right to have access to adequate housing which is enshrined in section 26 of the Contribution.
9. In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*, [5] the Constitutional Court stated that section 26 of the Constitution must be seen as making a decisive break from the past. It emphasises

the importance of adequate housing and in particular the security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.[6]

10. The construction and the order in Jaftha recognised that the sale in execution of a person's home limit the right to housing, and such limitation must be justifiable in terms of section 36 of the Constitution. Thus, judicial oversight was an essential element of the application for the sale of execution of a residential home.
11. However, the Constitutional Court in *Gundwana v Steko Development CC and Others*,^[7] clarified that the Jaftha decision applies not only in exceptional cases but also in typical mortgage foreclosure cases, i.e. the matter at hand.
12. Rule 46A of the Uniform Rules of Court was introduced to impose procedural rules to give effect to the right enshrined in section 26 of the Constitution and must be interpreted purposively against that backdrop.
13. The aim of Rule 46A is to assist the court in considering whether the section 26 rights of a judgment debtor would be violated if his/her house is sold in execution and therefore requires judicial oversight and consideration by a court of various factors to determine whether there is good cause to order execution against the immovable property concerned. The factors include whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor and whether there are alternative means by which the judgment can satisfy the debt other than execution against the judgment debtor's primary residence.
14. In casu, Defendant merely raised his section 26 rights without indicating how his constitutional right to adequate housing might be impacted. At no stage during the hearing of the matter did Defendant, who appeared in person, suggested that he and his family will as result of indigence be left vulnerable to homelessness if the property in question be sold in execution. On the contrary, Defendant

himself valued the property in the amount of R2 300 000.00 and submitted during the hearing hereof that the full outstanding

amount should be set as the reserved price at the sale of execution, without proffering any other means by which Defendant's

indebtedness could be satisfied. Defendant suggested, as set out in his papers, that he be allowed to continue to pay a monthly amount of R2 000.00 (which was increased to R4 000.00), towards his instalment of nearly R30 000.00 a month, until such time that he gets a job or recovers financially, losing count of the fact that his indebtedness towards Plaintiff continues to escalate.

15. In my view, there is no substance in Defendant's reliance on section 26 of the Constitution in opposing the summary judgment application or the Rule 46A application. It appears from the facts and the submissions made that it was raised purely as a dilatory defence, which is not good in law.

Second Defence: Defendant did not receive the section 129 notice:

16. In *Sebola and Another v Standard Bank of South Africa Ltd and Another*,^[8] Cameron J, writing for the majority, held the following in respect of the proper meaning of section 129 of the NCA, namely:

[86]...I conclude that the obligation section 130(1)(a) imposes on a credit provider to “deliver” a notice to the consumer is ordinarily satisfied by proof that the credit provider sent the notice by registered mail to the address stipulated by the consumer in the credit agreement, and that the notice was delivered to the post office of the intended recipient for collection there.

[87] To sum up. The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to “deliver”, requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If in contested proceedings the consumer avers that the notice did not reach her, the court must establish the truth of the claim. If it found that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.^[9]

17. Although the aforesaid conclusions reached in the *Sebola*-matter, quite clearly describe the interplay between the provisions of sections 129 and 130 of the NCA, culminating in the finding that section 129(1)(a) must be interpreted as requiring the credit provider to prove that the notice was indeed provided to the

consumer, and if posted, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, the broad statement made by Cameron J following the findings (the underlined

portion in the quotation above), required clarification.

18. In *Kabyana v Standard Bank of South Africa Ltd*,^[10] the Constitutional Court clarified the broad statement in the *Sebola*-matter, more particularly in relation to the misinterpretation of “contrary indication”, which was understood to mean that a consumer may simply aver that he or she did not receive the notice, in order to invoke the provisions of section 130(4)(b). To this end, Mhlantla AJ, referred to the statement made in *Sebola*, namely that “[T]he statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible”^[11], before clarifying the misreading of “contrary indication” in the following terms:

[52]...The “contrary indication” requirement applies to two inferences that a court may make: the inference that the notification from the Post Office (indicating that a registered item is available for collection) reached the consumer and the inference that a reasonable consumer would have

responded to that notification and retrieved the notice. The first inference is based on the reasonable assumption that when a credit provider has dispatched a notice by means of registered post, has specified the correct address for the consumer and has insured that the notice is delivered to the correct branch of the Post Office, the notification calling on the consumer to collect a registered item will be delivered to her address. A contrary indication would be a factor showing that, in the circumstances and despite the credit provider's efforts, the notification did not reach the consumer's designated address. The second inference is based on the assumption that a consumer acting reasonably would, having received the notification from the Post Office to retrieve a registered item, proceed to collect the notice. In these circumstances a contrary indication would be a factor showing that the consumer acted reasonably in failing to collect or attend to the notice, despite the delivery of the notification to her address.

[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.'[12]

19. Mhlantla AJ concluded that proof of delivery of a section 129 notice (when delivery occurs through the postal service), entails proof that:
 - (a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;
 - (b) the Post Office issued a notification to the consumer that a registered item was available for collection;
 - (c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary; and
 - (d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit

provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an example of why, in the circumstances,

the notice would not have come to the attention of a reasonable consumer.[13]

20. In casu, Plaintiff indeed sent the section 129 notice per registered post to Defendant's nominated postal address as depicted on the credit agreement. The nominated postal address is situated in Boksburg, and the track and trace report confirmed that it was duly dispatched and received at the correct Post Office. Moreover, the track and trace report confirm that a first and second notification were sent to Defendant, without any collection. In this regard, Plaintiff in my view satisfied the requirements of subparagraphs (a)-(c) referred to in the immediately preceding paragraph. Defendant did not dispute the aforesaid, but instead argued that Plaintiff failed to prove that Defendant collected the notice, which is not a rebuttal to the requirements set out above. Notably, Defendant's submission in this regard is premised on the exact misreading of "contrary indication" in the Kubyana-matter, which the Constitutional Court rejected out of hand. There is therefore no merit in Defendant's second defence.

Third defence: alternative and satisfactory remedies available, other than execution

21. The facts adduced by Defendant indicate that Plaintiff has since 2021 actively assisted Defendant through means of financial relief assistance, offering a holiday period on his loan account and the Quick Sell option, and even pended legal action in August 2022 upon receipt of a distressed application from Defendant. None of these measure managed to ensure that the arrears are settled and the account reinstated.
22. The summary judgment and Rule 46A applications were therefore brought after numerous attempts by Plaintiff to obtain payment from Defendant has failed, whilst Defendant did not dispute the debt. I therefore conclude that execution is the only remedy available in the circumstances of this matter, in view of the fact that all other remedies yielded no satisfactory outcome.
23. Notwithstanding the fact that I could not uphold any of the defences raised by Defendant, I deemed it appropriate to set a reserve price in this matter. To this end I allowed an updated valuation report of the property in terms of Rule 46A(8), which was submitted by Plaintiff in a supplementary affidavit. The updated valuation report indicated that the market value of the property is R2 250 000.00 and that a forced sale of the property will yield an amount of R1 800 000.00.
24. During the hearing of this matter counsel for Plaintiff graciously suggested that the valuation of the property put forward by Defendant, namely R2 300 000.00 should be considered in determining a reserve price, taking into account that Defendant has continued to pay amounts into his account, albeit insubstantial to eradicate the arrears to the account. I have already referred to this issue upfront and confirm that the reserve price was determined in accordance with the amounts proffered by Defendant.

25. In order to further afford Defendant every opportunity to remedy the situation, I suspended execution of the order for three (3) months and directed Defendant's attention to the provisions of section 129(3) and (4) of the NCA, wherefore I issued the order in paragraph 1 above.

ELLIS AJ

ACTING JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES:

For Plaintiff: Adv J Minnaar Instructed by: Hammond Pole Attorneys For Defendant: In person

Date of hearing: 11 March 2024 Date Delivered: 31 January 2025

- [1] Breitenbach v Fiat SA (Edms) Bpk 1972
- (2) SA 226 (T) at 228.
- [2] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) at [22], [24] and [26]-[27].
- [3] 2009 (5) SA 1 (SCA).
- [4] Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) at [31]-[33].
- [5] 2005 (2) SA 140 (CC).
- [6] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others
- [2004] ZACC 25; 2005 (2) SA 140 (CC) at [29].
- [7] 2011 (3) SA 608 (CC).
- [8] 2012 (5) SA 142 (CC).
- [9] Sebola and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC) at [86]-[87]. My own emphasis added.
- [10] 2014 (3) SA 56 (CC).
- [11] Sebola and Another v Standard Bank of South Africa Ltd and Another supra at [61].
- [12] Kubyana v Standard Bank of South Africa Ltd 2014
- (3) SA 56 (CC) at [52]-[53].
- [13] Kubyana v Standard Bank of South Africa Ltd supra at [54].

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