

SOUTH AFRICA / JUDGMENT

**SB Guarantee Company (RF) (Pty) Ltd
v Muhammad (35048/2019) [2020]
ZAGPJHC 291 (16 November 2020)
[2020] ZAGPJHC 291**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Maier-Frawley

CASE / FILE NUMBER

35048/2019

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 35048/2019

In the matter between:

SB GUARANTEE COMPANY (RF) (PTY) LTD Applicant

and

SHIABNE MUHAMMAD Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. In this application, SG Guarantee company (RF) (Pty) Ltd (the applicant) seeks judgment against Mr Shiabne Muhammad (the respondent) for payment of the sum of R2 888 127, including interest and costs, together with an order declaring mortgaged property specially executable.
2. The applicant's 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 The Standard Bank of South Africa Limited (Standard Bank).

3. The respondent opposed the application on various grounds, including a plethora of technical objections, however, only two such objections were ultimately pursued at the hearing of the matter. The first is that the certificate of balance relied on by the applicant in substantiation of the full balance outstanding to it by the respondent, is alleged to be invalid for non-conformance with the provisions of the certificate clause contained in the mortgage bond and in a home loan agreement concluded between Standard Bank (as lender) and the respondent (as borrower). Essentially the objection is that the signatory of the certificate is not authorised to sign same on behalf of the applicant. The second is that pre-litigation letters of demand (one of which was sent on behalf of Standard Bank (as credit provider) to the respondent in terms of section 129(1) of the National Credit Act, 34 of 2005 (the NCA) and the other of which was sent to the respondent on behalf of the applicant (as creditor/mortgagee)) failed to contain a notice alerting the respondent to the provisions of section 129(3) of the NCA, thus allegedly rendering the notices invalid.
4. Both the founding and replying affidavits were deposed to by Mr Riley Barry Moody on behalf of the applicant. Mr Moody is a manager in the employ of Standard Bank in its division known as Business support, Rescue and Recoveries, Personal and Business Banking Credit, having been authorised to do so by way of a resolution dated 25 April 2019 granted by the board of directors of the applicant (the resolution).

Further opposition

5. In addition to the technical objections mentioned earlier, the respondent opposes the grant of an order of special executability of the property forming the subject matter of the application on the following grounds:
 - (i) That the respondent, his children and mother in law reside at the properties and their rights of access to adequate housing will be infringed if the properties are declared specially executable;
 - (ii) In the event of the court declaring the properties specially executable, the execution of such order should be suspended pending the outcome of the sale of certain non-descript movable property owned by the respondent and which he avers would satisfy the arrears under the home loan agreement.

Factual matrix

6. The following facts were either common cause or not disputed and not refuted on the papers:
7. On 1 March 2015, the applicant and Standard Bank concluded a common terms guarantee agreement (guarantee agreement) in terms of which the applicant would from time to time guarantee the obligations of Standard Bank's debtors under individual home loan agreements (the guarantee agreement). It was recorded therein, inter alia, that:

7.1. Standard Bank had and would in future enter into individual home loan agreements with various debtors in terms of which Standard bank would advance funds to the relevant debtors against security of immovable property;

7.2. it was a condition of each home loan agreement that the applicant would guarantee the obligations of the relevant debtor to Standard Bank under the relevant home loan agreement and that the debtor would indemnify the applicant against any payment obligation it incurred under the guarantee and would register a mortgage bond in favour of the applicant over the relevant immovable property as security for the repayment of the indebtedness of the debtor under the indemnity.

8. Relevant terms of the guarantee agreement included, inter alia, the following:

8.1. In consideration for each debtor granting the required indemnity and registering a mortgage bond, and with effect from the date of registration of the mortgage bond, the applicant guaranteed, subject to the terms and conditions of the guarantee agreement, the due and punctual payment of all sums then and subsequently due by each debtor to Standard Bank under his or her respective home loan agreement;

8.2. On signature of a home loan agreement, an indemnity and a power of attorney authorising the registration of a mortgage bond, the

applicant would sign and deliver a guarantee to Standard Bank;

8.3. If Standard Bank notified the applicant in writing to make any payments to it as set out in clause 13, the applicant would proceed promptly against the debtor in any competent court and call up and foreclose on the mortgage bond or enforce such other remedies as may be available to it.

9. On 2 July 2018 the respondent and Standard Bank concluded a home loan agreement in terms of which Standard Bank agreed to lend and advance the sum of R2 800 000.00 to the respondent ('home loan agreement').

10. As security for the home loan, Standard Bank required, inter alia:

10.1. a guarantee by the applicant to Standard Bank in terms of which the applicant undertook to pay to Standard Bank the amount owing in terms of the home loan agreement in the event of a default by the respondent thereunder;

10.2. an indemnity by the respondent in terms of which he indemnified the applicant against any claim made by Standard Bank in terms of the aforesaid guarantee; and

10.3. a mortgage bond registered in favour of the applicant for the capital sum of R2 800000.00.

11. Relevant terms of the home loan included, inter alia, the following:

11.1. An event of default would occur under the home loan agreement if, inter alia, the respondent failed to pay any amount owing to Standard Bank thereunder on due date and/or there was a material deterioration in the debtor's financial position and/or the respondent otherwise breached the home loan agreement or any agreement between Standard Bank and the respondent and failed to remedy such breach within the time period provided in Standard Bank's written notice to the debtor do so.

11.2. In the event of default, Standard Bank could, at its election and without prejudice to any other remedy which it had in terms of the home loan agreement (including cancellation), recover from the respondent payment of amounts owing under the home loan agreement;

11.3. A certificate signed by any of Standard Bank's managers, whose appointment need not be proved would, on its mere production, be

sufficient proof of any amount due and/or owing by the respondent in terms of the home loan agreement, unless the contrary was proved (clause 24.11).

12. Pursuant to the home loan agreement, as read with the guarantee agreement:

12.1. the applicant signed and delivered a guarantee to Standard Bank in terms of which it guaranteed the due and punctual payment of all sums which were then, or which would subsequently become due and payable by the respondent to Standard Bank pursuant to the home loan agreement;

12.2. the respondent provided a written indemnity to the applicant in terms whereof the respondent acknowledged and agreed that if Standard Bank lodged or made a claim against the applicant on the guarantee, he would immediately be liable to the applicant in terms of the indemnity for the amount in which the applicant was liable under the guarantee; and

12.3. a first continuing covering mortgage bond for the sum of R2.8 million was registered over the respondent's immovable property

comprising of notarially tied Erf numbers: 5570; 5571; 5572; 5573, Kensington Township, held under Deed of Transfer No. T36622/2018 (the property) in favour of the applicant. The respondent hypothecated the property as security for his stated liability to the applicant, including 'every indebtedness or obligation of whatsoever cause and nature, whether then in existence or which may have come into existence in the future', including costs on the attorney and client scale.

13. In terms of clause 6 the bond, "A certificate signed by any director or administrator of the Mortgagee, whose appointment need not be proved, will on its mere production be sufficient proof of any amount due and/or owing by the Mortgagor to the Mortgagee and secured by or in terms of this bond, unless the contrary is proven."

14. In terms of clause 9 of the bond, if the respondent failed to observe or perform any provisions in the mortgage bond, or failed to pay any sum which may be legally claimable by the applicant, or failed to perform any other obligation on due date or at all, then all amounts secured by the mortgage bond would, at the applicant's option, become

immediately due and payable in full upon demand, and the applicant could then institute proceedings for the recovery thereof and for an order declaring the property specially executable.[1]

15. The respondent utilised funds advanced to him by Standard Bank with which to purchase the property. When the respondent defaulted in his obligations under the home loan agreement,[2] on 19 June 2019, Standard Bank despatched a breach notice in terms of s 129(1) of the NCA, in which it demanded payment of the arrears (then R90 324,78) within a specified period. When the arrears remained unpaid at the expiry of the said period, Standard Bank elected to cancel the home loan agreement, which election was conveyed to the respondent thereafter in writing. On 30 July 2019, Standard Bank called on the applicant to make payment under the guarantee and to institute legal proceedings against the respondent for the recovery of the full amount due by the respondent and to take steps, inter alia, to foreclose under the mortgage bond.
16. On 8 August 2019, the applicant's attorneys send a written letter of demand to the respondent for payment of the sum of R2 888 127,76 together with interest thereon at the rate of 10.51% per annum, calculated daily and compounded monthly in arrears from 30 July 2019 to date of payment, including monthly insurance premiums of R1 277.21 (being the full amounts outstanding of the respondent's indebtedness under the home loan agreement). Specific reference was therein made to the provisions of clause 3.2 of the indemnity signed by the respondent on 12 July 2018, in terms of which he acknowledged and agreed that if Standard Bank lodged a claim against the applicant in terms of the guarantee, the respondent would immediately be liable to the applicant for the amount in respect of which the applicant was liable to Standard Bank under the guarantee. It is on such basis that the applicant now looks to the respondent for payment in terms of the indemnity as read with the mortgage bond, in these proceedings.

Condonation

17. The respondent applied for condonation for the late filing of his answering affidavit, which was not opposed by the applicant. The respondent furnished a satisfactory explanation for the late delivery of his papers and no prejudice was suffered by any of the parties as a result thereof. I am of the view that it is in the interests of justice to grant condonation.

Analysis

18. From a close reading of the papers, no meaningful and substantive defence has been disclosed by the respondent to the claim proper. In particular, the respondent does not dispute (nor has it been refuted) that:

18.1. funds were advanced to him by Standard bank in accordance with the terms of the home loan agreement;

18.2. he breached the home loan agreement in that he defaulted on his monthly payment obligations thereunder;

18.3. he failed to pay the arrears owing under the home loan agreement notwithstanding receipt by him of a breach notice delivered by

Standard Bank pursuant to his default, as a result of which the acceleration clause in the home loan agreement was invoked, rendering

the full balance outstanding under the home loan immediately due, owing and payable;

18.4. the home loan agreement was validly cancelled by Standard Bank pursuant to the respondent's failure to remedy his default;

18.5. the applicant guaranteed payment of the respondent's indebtedness to Standard Bank under a guarantee provided by it to Standard Bank pursuant to the conclusion of the guarantee agreement;

18.6. the respondent indemnified the applicant against a claim made upon it by Standard Bank under the Guarantee;

18.7. Standard Bank called on the applicant to pay under the guarantee;

18.8. the full amount due, payable and owing by the respondent to the applicant under the indemnity is the amount of the claim lodged by Standard Bank against the applicant under the guarantee, which equates to the full amount of the respondent's indebtedness arising under the home loan Agreement; and

18.9. The applicant is for purposes of these proceedings the true holder of the claim.

Alleged invalidity of certificate of balance

19. The applicant put up two certificates of balance in respect of the respondent's indebtedness. The first certificate (annexure

'FA11' to the founding affidavit) was issued by the applicant and signed by the deponent to the founding affidavit (Mr Moodey) in his capacity as manager of Standard Bank 'for and on behalf of' the applicant 'who warrants his authority.' In terms of this certificate, the mortgagor's indebtedness to the applicant as at 30 July 2019 amounted to R2 888 127.78

(together with interest and monthly insurance premiums of R1 277.21).

20. The second certificate (annexure 'RA4' to the replying affidavit) was likewise issued by the applicant and signed by Mr Moodey in his capacity as a manager of Standard Bank 'for and on behalf of' the applicant 'who warrants his authority.' In terms of this certificate, the mortgagor's indebtedness to the applicant as at 18 February 2020 amounted to R2 914 771.84

(together with interest and monthly insurance premiums of R1 369.53).

21. As indicated earlier, clause 6 the bond required a certificate issued thereunder to be signed by ‘any director or administrator of the Mortgagee’ (applicant). Clause 24.11 of the home loan agreement required a certificate issued thereunder to be signed by ‘any of Standard Bank’s managers’. The term ‘administrator’ is not defined in the bond as such. Incidentally, the Collins dictionary cites positions such as ‘manager, head, official, director’ as synonyms for that of administrator.[3] The Oxford English dictionary defines administrator inter alia, as ‘a person legally appointed to manage...’[4] whilst the Merriam-Webster dictionary defines administrator inter alia, as a person ‘vested with the right of administration...’[5] The Macmillan dictionary[6] cites ‘agent’ as a synonym for administrator. The Free dictionary refers to administrator as ‘a person appointed to administer...’ or ‘a person authorised to manage...’
22. In terms of the resolution of the board of directors of the applicant,[7] Mr Moodey, in his capacity as ‘Manager: Business Support, Rescue and Recoveries, Personal and Business Banking Credit, a division of The Standard Bank of South Africa Limited’ was authorised by the applicant for the period 01 March 2019 to 20 April 2020, to do various acts on behalf of the applicant, inter alia, to ‘settle the terms of and sign any affidavits or documents that may be required in relation to any litigation and liquidation proceedings affecting the applicant.’[8] (own emphasis)
23. The bond does not preclude or prohibit the applicant from authorising any person (such as Moodey) to act in the stead of one of its directors or ‘administrators’, thereby delegating the signing of the certificate of balance to such person, as authorised. Mr de Oiveira who appeared on behalf of the applicant submitted that the clause in the resolution is wide enough to cover the signing of the certificate of balance by a person who is authorised by the applicant’s board of directors to sign any document required in litigation affecting the applicant. I agree. Even if the certificates were to be excluded, and even if no certificate had been put up by the applicant, it would not matter, given that the pleaded allegations as to the quantum of the applicant’s claim were not in dispute.[9] It therefore ill-behoves the respondent to argue, as he sought to do at the hearing of the matter, that there is no evidence as such before court in respect of either the arrears under the home loan or the total amount outstanding under the bond. The objection lacks merit and accordingly cannot be sustained.

Failure to include notice in terms of s 129(3) of NCA

24. The respondent contends that it was incumbent upon the applicant to incorporate a notice in terms of s 129(3) of the NCA in its letter of demand that was issued by it in terms of s 129(1) of the NCA.
25. What is sought to be enforced in these proceedings is the indemnity provided by the respondent (read together with the provisions of the bond) and not the underlying credit (home loan) agreement as such. The indemnity is not either a credit agreement as such. To the extent that the applicant’s letter of demand dated 8 August 2019 made reference to

section 129 of the NCA, thereby erroneously incorporating those provisions in the letter of demand does not necessarily mean that section 129 of the NCA applied to the claim absent any allegation that the applicant incorporated those provisions in the bond. [10]

26. The respondent sought to rely on what was stated in Mokebe,[11]namely that:

“... Foreclosure of immovable property, which is the primary residence of a consumer, has a major impact on the right contained in s 26(1) of the Constitution: the right to have access to adequate housing. Section 129(3) and (4) of NCA must therefore be interpreted to promote this right. A default judgment and declaration of the immovable property as specially executable, and the sale of immovable property in satisfaction of such default judgment should not be a bar to revival of the agreement. What militates against the revival of the agreement, is inter alia, the sale and receipt of the proceeds of such sale. Before then, a consumer may revive or reinstate the agreement. In order to ensure that the home owner understands his or her right, we are of the view that the following statement must be incorporated in a document initiating the proceedings where a mortgaged property may be declared executable, such statement to be made in a reasonably prominent manner:

‘The defendants’ (or respondent’s) ‘attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he/she may pay to the credit grantor all amounts that are overdue together with the credit provider’s permitted default charges and reasonable agreed or taxed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.’...”

27. In my view, reliance on the above extract from Mokebe was misplaced within the context of these proceedings. The court in Mokebe was referring to reinstatement of credit agreements capable of being reinstated prior to a sale in execution and the receipt of the proceeds of a sale. Mokebe was not concerned with credit agreements that have in fact been validly cancelled by a credit grantor.

28. Section 129(3) of the NCA provides as follows:

‘Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, 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.’ (own emphasis)

29. Section 129(4)(c) in turn provides that a credit provider may not reinstate or revive a credit agreement after the termination thereof in accordance with s 123.

30. The respondent’s right to reinstatement in terms of s 129(3), subject to s 129(4), is largely mirrored in the express terms of the home loan agreement, as follows:

‘If you are...in default of your Repayment obligations in terms of this Agreement, you may at any time before cancellation of the Loan by us, pay to us all amounts that are overdue, together with Defaultlt Administration Charges, Collection Costs and/or reasonable legal

costs incurred up to date of payment in terms of this clause...' [12]

(own emphasis).

31. There is no dispute that Standard Bank complied with its obligations under Part C of Chapter 6 of the NCA. It was entitled to terminate the home loan agreement and did so by giving notice thereof to the respondent

in a letter of 29 July 2019 as follows: 'In light of the respondent's failure to remedy their breach, the applicant has elected to cancel the Agreement, which it hereby does.'[13]

32. The respondent accordingly enjoys no right to reinstate the credit agreement as cancellation thereof is a bar to reinstatement.[14] In circumstances where there exists no right in law to reinstate the credit agreement by virtue of its cancellation, it would be

misleading to refer the consumer to the provisions of s129(3) in the notice of motion or in any pre-litigation letter of demand dispatched to the respondent after cancellation of the relevant credit agreement. For these reasons, the objection on this ground likewise cannot be sustained.

Infringement of respondent's right of access to adequate housing

33. The respondent baldly avers that his constitutional right to adequate housing in s 26(1) of the Constitution will be infringed if an order for special executability is granted.
34. A litigant is called upon to justify an infringement of a constitutionally protected right only once it has been established that an infringement has in fact occurred.[15] A right of access to adequate housing does not mean that one has a right to housing of one's choice.[16]
35. The respondent alleges that 'if a judgment is granted, I will not be able to secure rented premises as once a judgment is granted against one, landlords are loathe to rent out property...' [17] Aside from the fact that no primary facts were provided in support of the conclusion aforesaid, the respondent has not disclosed his personal income and expenditure nor has he indicated to what extent he is able (or not) to afford suitable alternative accommodation. On the contrary, the respondent states in para 36 of the answering affidavit that he is possessed of 'substantial movables',

without however describing same or stating where they may be located. No reason has in any event been given for why the respondent cannot liquidate or has not liquidated such movables in order to either settle part or all of his indebtedness to the applicant or to fund suitable alternative accommodation for himself and his family.

36. As pointed out in NPGS:[18]

‘...there is an onus on the debtor at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the ... debt.’

37. The respondent has failed to discharge such onus, having contented himself with vague and unsubstantiated averments in relation to the aforesaid issues, whilst seemingly rather focussing on raising a host of prima facie unmeritworthy technical objections in his answering papers.

Stay of execution pending sale of movables

38. In the event that judgment is granted as prayed, the respondent requests that an order declaring the immovable property executable be held over pending execution against his movable property, which he avers is ‘more than sufficient to cover the arrears’ so that ‘once the arrears are paid, the agreement is revived.’ I have already dealt earlier with the fact that the respondent has no right in law to the reinstatement of a credit agreement that has been cancelled in accordance with the provisions of s 123 of the NCA, as is the position in casu.
39. Moreover, it has been held that where a debtor claims to have sufficient movable property, but fails to point out same or make same available for execution, a creditor is entitled to execute against his immovable property.[19]

Rule 46A considerations

40. Rule 46(1) regulates the process for executing against the immovable property of a judgment debtor, which process includes execution

against residential immovable property of a judgment debtor, subject to the provisions of rule 46A where such residential property

constitutes the primary residence of the judgment debtor. If it does, Rule 46A(2)(b) enjoins the court to consider all relevant factors to determine whether execution is warranted, with the aim of safeguarding the rights of the debtor where the execution process would amount to a deprivation of the right to access adequate housing as enshrined in section 26 of the Constitution.

41. Rule 46A accords the protection of judicial oversight to debtors who are at risk of losing their primary residence, as a safeguard against attempts by unscrupulous creditors to exact payment of a debt through execution against the primary residence of a debtor when other reasonable and less invasive avenues of payment may be pursued and to ensure that execution is proportionate, having regard to all relevant circumstances. The safeguards afforded by the procedural mechanisms contained in Rule 46A to individual consumers who are at risk of losing their homes are further aimed at preventing an abuse of the process.
42. Relevant circumstances pertinent to the present matter are as follows:

- 42.1. The property in question is the primary residence of the respondent. It is a freehold property and thus no amounts are owed to a body corporate of homeowners association;
- 42.2. As at 30 July 2019, the arrears under the home loan agreement amounted to R75 324.78;
- 42.3. The monthly instalment was R76 504.78;
- 42.4. As appears from the sworn valuation attached to the papers, the market value is estimated to be R2.2 million; the forced sale value is R1.550 million; and the municipal value is R1.662 million;
- 42.5. As at 11 June 2019, the outstanding municipal charges amounted to R69 000.00;
- 42.6. In terms of an updated certificate of balance filed by the applicant prior to the hearing, the respondent's full outstanding liability as at 6 October 2020 amounts to R3 027 199.82 (together with interest and monthly insurance premiums of R1 470.75);
- the current monthly instalment is R27 391.89 whilst arrears have increased to R283 818.93;
- 42.7. The applicant and its attorneys engaged the respondent from approximately 28 June 2019 in an attempt to negotiate terms of settlement to prevent foreclosure. The applicant states that other than an insignificant payment of R15 000.00 on 28 June 2019, no further payments have been made and further engagements failed to yield a realistic or reasonable commercial solution;
- 42.8. Standard Bank complied with sections 129 and 130 of the NCA;
- 42.9. On his own version, the respondent has 'substantial' assets which he could liquidate in order to finance adequate alternative housing. The respondent is employed and does not fall within the demographic of the vulnerable or poor debtor – he has been able to employ and presumably pay for legal services, which he utilised prior to the institution of these proceedings and throughout these proceedings;
- 42.10. There is no evidence of any abuse of the process by the applicant (or Standard Bank) or at least, none has been alleged in the papers.
43. The applicant contends that having regard to the forced sale value of the property, there appears to be no equity in the property and no way of avoiding a shortfall after execution. The applicant is, however, not averse to a reserve price being set in respect of a sale in execution, that is, in the event that an order declaring the property specially executable is granted.
44. Both parties are agreeable to a reserve price being set in the amount of R1 861 342.58, as computed by the applicant, which amount I consider to be both reasonable and justifiable.

45. I am satisfied that the applicant has established its entitlement to the relief sought. The general rule is that costs follow the result. I see no reason to depart therefrom. The relevant agreements provide for costs to be paid by the respondent on the attorney and client scale.

46. Accordingly, the following order is granted:

ORDER

1. The late filing of the respondent's answering affidavit is condoned.
2. The respondent is to pay the sum of R3 027 199.82 to the applicant.
3. The respondent is to pay interest on the aforesaid sum at the rate of 7.510% per annum from 6 October 2020 to date of payment, together with monthly insurance premiums of R1 470.75.
4. The following immovable properties are declared specially executable:
 - 4.1 Erf 5570 Kensington Township, Registration Division I.R, the Province of Gauteng, Measuring 495 (Four Hundred and Ninety-Five) Square Metres, Held by Deed of Transfer No. T36622/2018;
 - 4.2 Erf 5571 Kensington Township, Registration Division I.R, the Province of Gauteng, Measuring 495 (Four Hundred and Ninety-Five) Square Metres, Held by Deed of Transfer No. T36622/2018;
 - 4.3 Erf 5572 Kensington Township, Registration Division I.R, the Province of Gauteng, Measuring 495 (Four Hundred and Ninety-Five) Square Metres, Held by Deed of Transfer No. T36622/2018; and
 - 4.4 Erf 5573 Kensington Township, Registration Division I.R, the Province of Gauteng, Measuring 495 (Four Hundred and Ninety-Five) Square Metres, Held by Deed of Transfer No. T36622/2018.
5. The Registrar of this Court is authorised and directed to issue a Warrant of Execution against the aforesaid immovable properties of the respondent.
6. The sale in execution of the aforesaid immovable properties shall be subject to a reserve price of R1 861 342.58.
7. The respondent is ordered to pay the costs of the application on the attorney and client scale.

__A. Maier-Frawley

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected 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. The date for hand-down is deemed to be 16 November 2020.

Date of virtual hearing:

7 October 2020

Judgment

delivered:

16 November 2020

APPEARANCES:

Counsel for Applicant:

Mr M De Oliveira

Attorneys for Applicant:

Jason Michael Smith Incorporated Attorneys

Attorney for Respondent: Mr Larry Marks

Attorneys for Respondent: Larry Marks Attorneys

- [1] The home loan agreement contained a similar acceleration clause.
- [2] The respondent first defaulted on his payment obligations in February 2019, i.e., less than a year after the conclusion of the home loan agreement.
- [3] See: <https://www.collinsdictionary.com/dictionary/english/administrator>
- [4] Per Oxford English Dictionary: <https://www.lexico.com/definition/administrator>
- [5] See: <https://www.merriam-webster.com/dictionary/administrator#:~:text=1%20%3A%20a%20person%20legally%20vested,network%20or%20system%20network%20administrators>
- [6] <https://www.macmillandictionary.com/dictionary/british/administrator>
- [7] Annexure 'RA1' to the replying affidavit.
- [8] Para 6 of the resolution.
- [9] The respondent unequivocally admitted in para 52 of the answering affidavit that as at 30 July 2019, the full outstanding balance owed under the home loan agreement was R2 888 127.78 together with interest thereon at the rate of 10.51% per annum from 30 July 2019 to date of payment, together with monthly insurance premiums in the sum of R1277.21, and that the arrears were on that date, the sum of R78 324.78.
- [10] See: RMB Private Bank (a division of Firstrand Bank Ltd) v Kaydeez Therapies CC (in Liquidation) and Others 2013
- (6) SA 308 GSJ.

[11] Absa Bank Limited v Mokebe and Related Cases 2018

(6) 492 (GJ), para 46.

[12] Clause 20.5 of the home loan agreement.

[13] In Cloete v Murray and Another NNO v Firststrand Bank Ltd t/a Wesbank 2015

(3) SA 438 (SCA, par 33, the SCA reiterated that 'Cancellation is a unilateral act of a party to an agreement and, save for giving the other party notice of such cancellation, it does not occur in or by means of any process associated with any form or forum'.

[14] See: Nkata v Firststrand Bank Ltd 2016

(4) SA 257 (CC).

[15] Standard Bank of South Africa Ltd v Saunderson and Others 2006

(2) SA 264 (SCA) at para 20.

[16] Saunderson (fn15 above) at para 17.

[17] Para 36, answering affidavit.

[18] NPGS Protection & Security Services CC and Another v Firststrand Bank Ltd 2020

(1) SA 494 (SCA) at para 55.

[19] See: Nkola v Argent Steel Group (Pty) Ltd 2019

(2) SA 216 (SCA), paras 8 to 11. Albeit that in Nkola a where a prior money judgment had been obtained and the provisions of Rule 46(1)(a)(i) were applicable, the principle is nonetheless

applicable to the facts of the present matter notwithstanding that the application has been brought under the provisions of Rule

46(1)(a)(ii) read with Rule 46A of the Uniform Rules of Court.

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