

SOUTH AFRICA / JUDGMENT

Silinda v ABSA Home Loan Guarantee Co (RF) (Pty) Ltd and Another (5235/2021) [2025] ZAMPMBHC 28 (15 April 2025)

[2025] ZAMPMBHC 28

COURT

Mbombela High Court, Mpumalanga

BEFORE

Ryneveldt

CASE / FILE NUMBER

5235/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA

CASE NO: 5235/2021

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED: No

DATE

15/04/2025

SIGNATURE

In

the matter between: ERICK
 SIBUSISO
 SILINDA
 APPLICANT
and
 ABSA
 HOME LOAN GUARANTEE CO (RF) (PTY)
 LTD
 FIRST RESPONDENT
 ABSA
 BANK LTD
 SECOND RESPONDENT

JUDGMENT

Ryneveldt AJ

- [1] This is an application for leave to appeal the court order handed down by me on 30 May 2024, in which I granted an order in favour of the First and Second Respondents for the judicious execution of ERF 2[...] W[...] A[...] Extension 25 Township, Registration Division J.T., Province of Mpumalanga in Extent: 281 (two hundred and eighty-one) square meters, held by Deed of Transfer T5448/2018, subject to such conditions as set out in the aforesaid registration number 2003/003410/08 (“the property”).
- [2] As a brief background of the matter, the Applicant took out a mortgage on the property. The Applicant signed a written indemnity agreement in favour of the First Respondent and its successors in title by which the Applicant willingly undertook for the property to be executable in favour of the First and Second Respondents, provided all the required legal prescripts are followed as set out specifically in terms of section 129 of the National Credit Act 34 of 2005, as amended (“the Act”).
- [3] As on 20 March 2018 and respectfully 22 March 2018 the parties entered into a written loan agreement (“the agreement”), in Nelspruit, Mpumalanga, in which the Applicant took out a mortgage on the property to the value of R1 033 939.16 (one million, thirty-three thousand, nine hundred and thirty-nine rand and sixteen cents) (“the loan amount”).
- [4] In terms of the loan agreement, the Applicant was obligated to repay the loan amount over a period of 240 (two hundred and forty) monthly instalments to the value of R10 677.07 (ten thousand six hundred and seventy-seven rand and seven cents), depended on an adjusted monthly interest rate as set out in the terms and conditions of the loan agreement.
- [5] On 09 February 2022, summons was served on the Applicant in that the Applicant fell in arrears in an amount of R65 762.12 (sixty-five thousand seven hundred and sixty-two rand and twelve cents) as on 19 October 2021.

- [6] With reference to the summons, the First and Second Respondents demonstrated their compliance with the Act as fully set out in paragraphs 27 to 30 of their summons.
- [7] On 23 February 2022, the Applicant filed a notice to oppose the First and Second Respondents summons, which was served on the First and Second Respondents Attorneys on 23 February 2022.
- [8] On 26 January 2023, the First and Second Respondents filed and served an application for default judgment in terms of Rule 31(2)(a) and Rule 46(1)(a)(ii) and Rule 46A of the Uniforms Rules of Court, in which they have set out their reasons as to why the default judgment should be granted against the Applicant, on the Applicant's Attorneys of record on 6 March 2023.
- [9] On 3 April 2023, the default judgement application was removed from the court roll by the First and Second Respondents. On 17 July 2023, the First and Second Respondents issued another default judgement, of which a copy was served on the Defendant's Attorneys of record in July 2023 (the specific date on when it was served is not clear from the papers).
- [10] On 11 September 2023, the Applicant filed his notice of intention to oppose the default application. Subsequent to the opposition from the Applicant, the default judgment was enrolled for hearing on an opposed basis on 19 January 2024. A copy of the said default application was served by the Sheriff on the Applicant in person on 11 December 2023.
- [11] In opposing the default judgement, the Applicant raised an issue in law, seeing that a previous default judgment had been set down that has not been finalised, and for this reason that matter was *lis pendens*.
- [12] With reference to this Court's Practice Directive all opposed motion court matters are mandated to be case managed in terms of Form B. On 19 January 2024, the matter appeared before my brother Roelofse AJ, in which he made the Form B completed by all the parties an order of court marked "X". The court order stated the following:
- 12.1 The date of the hearing was set for 30 May 2024;
- 12.2 The Applicant should file his Answering Affidavit on 1 February 2024;
- 12.3 The First and Second Respondent should then file their Replying Affidavit on 15 February 2024;
- 12.4 The First and Second Respondents' Heads of Argument should be filed by 28 March 2024; and
- 12.5 The Applicant's Heads of Argument should be filed on 29 April 2024.
- [13] On 20 March 2024, the First and Second Respondents' attorneys served a notice of set down on the Applicant's attorneys of record.

- [14] As from the date of the court order granted by my brother (Roelofse AJ), the Applicant failed to adhere to the said court order, and when the matter appeared before me on 30 May 2024, there were no opposing papers (Answering Affidavit) and or any Heads of Argument by the Applicant before me.
- [15] As a matter of fact, when the matter was called on 30 May 2024, the Applicant sought a postponement of the matter which was vigorously opposed by the First and Second Respondents.
- [16] As of 19 January 2024, when the matter appeared before my brother Roelofse AJ, the Applicant was aware of the upcoming hearing set down for 30 May 2024, and that certain requirements and or obligations were placed on him to ensure the efficacious adjudication of the opposed default application.
- [17] It is imperative to note that as on 23 February 2022, the Applicant entered a notice of intention to oppose the First and Second Respondents' summons, while at the time being represented by MT Silinda and Associates Inc Attorneys. When the First and Second Respondents initiated their default application, the Applicant was then represented by P Mavuso Attorneys, where they filed a notice of opposition on the First and Second Respondents on 11 September 2023. However, on 16 October 2023, P Mavuso Attorneys withdrew as the Applicant's attorneys of record.
- [18] On 11 January 2024, the Applicant appointed new attorneys of record, Lubisi Attorneys Inc, who then raised a point in law on the basis that a previous default application against the same property has already been instituted against the Applicant that has not been finalised.
- [19] On 19 January 2024, when Form B marked "X" was made an order of court the Applicant was still represented by Lubisi Attorneys. The notice of set down (hearing date 30 May 2024) was served on the Applicant's attorneys of record (Lubisi Attorneys) on 30 March 2024.
- [20] Despite having been legally represented by attorneys as at the time of the service of the notice of set down, the Applicant failed to adhere to the court order handed down by my brother Roelofse AJ, where by 1 February 2024, the Applicant were to have served and filed his Answering Affidavit, which the record clearly indicates has not been done, neither did the Applicant file and serve his Heads of Argument on 29 April 2024.
- [21] On the day of the hearing before me on 30 May 2024, the Applicant was not represented by any attorneys, neither did I see any notice of withdrawal from his erstwhile attorneys, Lubisi Attorneys, on record.
- [22] On the day of the hearing, I gave the Applicant, in his personal capacity, an opportunity to address me on why there was noncompliance with the court order of my brother Roelofse AJ, and on what basis does he seek a postponement of the matter.

- [23] The submissions made by the Applicant in his personal capacity did not clarify to any extent his non-compliance with the said court order, and/or on what legal substantive grounds his matter should be postponed in order for him to comply with the said court order.
- [24] After having read and considered the Applicant's submissions for a postponement and the submission from the First and Second Respondent's legal representative on why a postponement should be refused, and after having applied my mind to the merits and facts of the matter, I denied the postponement and made the draft court order handed up to me by the First and Second Respondents an order of court.
- [25] In the case of *Psychological Society of South Africa v Qwelane and Others (Qwelane)*[1] the Constitutional Court stated that:

"In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly,

this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the

interests of the immediate parties, but also by what is in the broader public interest."

- [26] It is evident from the papers and the submissions made by the Applicant that the application for postponement fell hopelessly short of the what the Constitutional Court stated in *Qwelane*, in that no timeous application was made for the intended postponement application, and to add, the prejudice suffered by the First and Second Respondents can simply not just be flouted and or justified by a costs order, by allowing the Applicant to adhere to his obligations that have already been set out in a court order dated 19 January 2024, which he clearly failed to do.
- [27] It is common practice for an Applicant seeking postponement to provide good and convincing reasons for a postponement, with an added obligation that the Applicant provides a thorough and adequate explanation of the circumstances that led to the necessity of such an application,[2] which was clearly not the case in this matter.
- [28] Having regard that the matter has been clogging up the court roll as from 2021, and premised on the fact that no cogent reasons for the postponement were proffered by the Applicant and having to weigh the prejudice of the First and Second Respondents, and the obligations for courts to finalise matters as a matter of priority, and applying my judicial discretion, the Applicant's postponement application was dismissed and the draft order handed up to me marked "X" was made an order of court. This is in line with the maxim that the interest of justice demands that a court inexpensively and expeditiously finalises all litigations with the core intent to further the administration of justice.[3]

Application for Leave to Appeal

- [29] On 1 July 2024, the Applicant instituted an application for leave to appeal the court order handed down by me on 30 May 2024.
- [30] In terms of his application for leave to appeal, the Applicant raised 6 (six) legal and factual grounds on why the order handed down should be appealed, chief among these grounds was my refusal to grant his postponement.
- [31] The remaining 5 (five) all have a common thread in that, according to the Applicant, I refused him the right to have his matter postponed so that it can be properly ventilated the next time the matter comes to court, on the premise that there are existing grounds on why the matter was delayed and that there are sound legal grounds on why the matter became opposed, with the Applicant having set out his grounds of opposition to the First and Second Respondents default application by raising an issue of law, *lis pendens*.
- [32] It is common knowledge that section 17 of the Superior Courts Act 10 of 2013, stipulates that there are only 2 (two) scenarios in which leave to appeal may be granted. The first scenario that is anticipated is when the judge in question believes that there is a reasonable chance that an appeal would be successful. The second scenario is when there are strong arguments for granting the appeal.
- [33] It is evident from how the matter has been litigated by the Applicant that he was legally represented and that of relevance, on 19 January 2024, when Form B marked "X" was made an order of court, the Applicant through his legal representative knew and understood his legal procedural obligations that needed to be fulfilled before the matter was to be heard on 30 May 2024, this is all common cause.
- [34] One of the pillars of any judicial proceedings is the assurance and commitment by all parties to abide by the rules of court and or any court directive, not only does it place an obligation on all the parties involved to adhere to the rules of court and/or court directives, but the core objective is to ensure that justice can be dispensed efficiently and in an orderly fashion, thus it enables the court processes to be seamlessly streamlined to ensure that matters can be dealt with efficiently and as speedily as possible.
- [35] At the time when the application for a postponement was made, no adherence was given to this honourable court's practice directive, which clearly and unambiguously stated that for such an application a party seeking the indulgence of a court for a postponement is obligated to bring a substantial application[4], however no such application was brought instead the Applicant represented himself in court and simply asked for a postponement without even proffering any substantive grounds on why he seeks the court's indulgence at the time.

- [36] The Applicant's failure to adhere to this Court's practice directive, and for the mere fact that a postponement application was made from the bar, in person by the Applicant himself, did not outright place the odds in favour of the Applicant, in fact as a presiding officer I am obligated to ensure the efficient adjudication of matters by adhering to the court rules and practice directives of this division.
- [37] The total disregard of the Applicant to adhere and abide by a court order already handed down on 19 January 2024, is a clear indication that the Application was abusing the court process, for if not, by the very least while having been represented by attorneys, his legal representatives ought to have ensured compliance with the said court order, which clearly was not the case, and if not, the Applicant himself were to have ensured compliance. A postponement of a matter is not just merely for the asking,[5] a party seeking such indulgence must first and for all adhere to the court rules and practice directive and failure to do so is at his/her own detriment.
- [38] In respect of applications for leave to appeal, the courts have made the requirements abundantly clear over the years, especially the Supreme Court of Appeal in *Chithi and Others; In re: Luhlwinini Mchunu Community v Hancock and Others*,[6] where it stated that "leave to appeal may only be given if the judge or judges are of the opinion that the appeal would have a reasonable prospect of success".
- [39] As adumbrated supra the legal precepts and judicial precedence do not favour the granting of the Applicant's leave to appeal, regard given that the matter in toto, the facts and legal points raised before me by both parties, clearly indicates that the Applicant's application for leave to appeal does not have any prospects of success, and to top it all there is no probability that another court would find otherwise for the simple fact that no cogent opposition of the default judgment has been set out in paper (in the Applicant's Answering Affidavit- as it is non-existent).
- [40] The postponement of the matter would not have given any advantageous leeway, as the Applicant would have to abide by another court order to file and serve his opposing papers timeously. In fact, the point in law raised (*lis pendens*) also does not bear any weight for the simple reason that it is not an all new default application that was removed and then reinstated later by the First and Second Respondents, the merits of the default application are the same and the facts on which it was based did not change in any material way that could have even justified the legal argument of a *lis pendens*.
- [41] As a further demonstrative act, this court gave the Applicant benefit of doubt on 2 December 2024, when the Applicant was legally represented, an indulgence to postpone this Application on the basis that the Applicant through his newly appointed legal representatives will ensure that the transcribed records of the hearing dated 30 May coupled with the Applicant's Heads of Argument will be filed by 24 January 2025. Once again the Applicant failed to abide by another court order and instead on the day of the hearing, on 30 January 2025, the Applicant was once again not legally represented and represented himself,

and even when probed on why he is not legally represented once again he could not submit any cogent argument besides for saying that he is no longer legally represented, and that he is in the process of selling the property in question, with the assurance that he had already secured a buyer for the property.

[42] On 30 January 2024, no mention and or any submission was made by the Applicant to justify the 6 (six) grounds of appeal, and even if so, no other court would come to any different conclusion to the order handed down on 30 May 2024.

[43] It is thus evident from what is already set out in the context of this judgment that the Applicant disconsolately fell short of the legal and factual requirements on why he should be granted leave to appeal the 30 May 2024 court order.

In the result, I make the following order:

1. The Applicant's application for leave to appeal is dismissed.
2. The Applicant is liable for the First and Second Respondents' costs of this application on an attorney and client scale, scale B.

D RYNEVELDT

ACTING JUDGE OF THE HIGH COURT

Appearances

For the Applicant: Applicant appeared in person For the Respondent: Adv. Eastes Instructed by: Delberg Attorneys Inc Date heard: 30 January 2025 Date of Judgment: 15 April 2025

[1] Psychological Society of South Africa v Qwelane and Others 2017

(8) BCLR 1039 para 31.

[2] Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amicus Curiae) [2007] ZACC 14; 2007

(5) SA 620 (CC) at 624B-C.

[3] Arendsnes Sweefspoor CC v Botha

[2013] 3 All SA 605 (SCA) para 19.

[4] Clause 16.9 of this Court's Practice Directive.

[5] Myburg Transport v Botha t/a Truck Bodies 1991

(3) SA 310 (Nms) at 314F-315J: "The trial Judge has a discretion as to whether an application for a postponement should be granted or refused".

[5] Myburg Transport v Botha t/a Truck Bodies 1991

(3) SA 310 (Nms) at 314F-315J:

“The trial Judge has a discretion as to whether an application for a postponement should be granted or refused”.

[6] Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others

[2021] ZASCA 123 para 10.

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Prepared on 13 October 2026 · Esheria