IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NO: D8880/2021

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED
REGISTRATION NUMBER: 1962/000738/06 **PLAINTIFF**

and

GAVIN CHRISTOPHER YOUNG **FIRST DEFENDANT**

JOLENE CLAIRE YOUNG **SECOND DEFENDANT**

ORDER

1. The application is dismissed with costs.

2. The registrar is directed to send a copy of this judgment to the Legal Practice Council, Kwazulu-Natal.

3. The registrar is directed to send a copy of the judgment together with a full set of the application papers to the Banking Services Ombudsman.

JUDGMENT

Henriques J

[1] This is an application in terms of rule 46A of the Uniform rules in which the plaintiff seeks default judgment against the first and second defendants (hereinafter referred to collectively as 'the defendants') for payment of the sum of R381 918.59 together with interest at the rate of 5.300 percent per annum from 18 August 2021 to date of payment, together with monthly insurance premiums and costs as well as an order declaring the immovable property executable.

Facts advanced in the application for the relief sought

[2] It is common cause that the defendants are the registered owners of the immovable property situate at [……..], Newlands East and the plaintiff is the registered bond holder. A bond was registered over the immovable property as security for the home loan advanced to the defendants. In terms of the home loan agreement, the defendants were required to effect monthly payments towards the outstanding home loan as well as interest and the monthly insurance premiums.

[3] It is undisputed, in the absence of opposition by the defendants, that they breached the terms of the credit agreement resulting in the plaintiff despatching the requisite notice in terms of s 129 of the National Credit Act 34 of 2005 ('the NCA') dated 19 August 2021, drawing the defendants attention to their breach of the agreement and calling upon them to comply with the provisions of s 129.

[4] Such notice also informed them *inter alia* that they had failed to make payment of the full monthly instalments due under the loan agreement and consequently were in breach thereof. They were required to remedy their breach by making payment of all the arrears and overdue amounts, failing which the plaintiff would enforce its rights in terms of the agreement and recover the full balance outstanding under the loan agreement together with interest and costs. The ten day period prescribed in the s 129 notices lapsed and the plaintiff then instituted action on 27 September 2021.

[5] In the particulars of claim, the plaintiff indicates what the arrears and monthly instalments were and the nature of the breach of the agreement by the defendants. The particulars of claim indicate at paragraphs 18 and 19 that the defendants first fell into arrears in terms of the loan agreement on or about March 2019. This is also borne out by the schedule of payment history annexed to the application papers.

[6] The plaintiff details its attempts to assist the defendants to regularise their loan repayments by placing eight telephone calls to the defendants and transmitting four SMS messages to the defendants as well as six electronic mails. Attached to the application papers as '**JKN6'** are file notes in respect of the telephonic interactions between the plaintiff's banking officials and the defendants.

[7] On 30 September 2021, the Sheriff effected service of the summons, particulars of claim and annexures as well as a notice of opposition to mediation in terms of rule 41A by leaving copies of such processes in the post box at the defendants chosen *domicilium*.

[8] Similarly, the application for default judgment and orders in terms of rule 46A were also served at the chosen *domicilium* by placing same in the post box on 10 and 13 December 2021 respectively. Consequently, there was no personal service of either the summons and particulars of claim instituting the action nor the application for default judgment and the rule 46A application.

[9] In the founding affidavit of the Rule 46A application deposed to by Joy Keila Ngcobo ('Ms Ngcobo'), a home loans legal manager in the employ of the plaintiff, she

indicates that she has access to the plaintiff's computer systems to enable her to see the clients contact information, accounting records, recorded agreements and numerous other reports and notes specific to the matter. She further indicates that the contents of the affidavit are within her direct knowledge and confirms, under oath, that the contents are both true and correct.

[10] She sets out the purpose of the application and the amount claimed by the plaintiff in terms of the home loan agreement. The plaintiff alleges the immovable property is the primary residence of the defendants and indicates at paragraph 17 of the affidavit that the application will be served on them.

[11] Amongst the relevant circumstances which Ms Ngcobo requests the court take into consideration[1] are the arrears which it is alleged accumulated as a result of sporadic and non-payment of the monthly instalments by the defendants. At paragraph 20, Ms Ngcobo confirms on oath that as at 23 November 2021 the arrear amount was R93 606.29, the monthly instalments was the amount of R8 383.38 and the last payment made by the defendants was on 7 May 2020 in the amount of R6202.13. In support of these averments and allegations, reference is made to the bond statement annexed to the founding affidavit as '**JKN3**'. More will be said about annexure **'JKN3'** later in the judgment.

[12] In addition, the documents which Ms Ngcobo asks the court to consider are a valuation report compiled by GAP Management (Pty) Ltd, a registered valuation company, deposed to on 13 October 2021 reflecting the market value of the immovable property to be R600 000. The Ethekwini municipal valuation of the property is R530 000 and the amount due to the municipality for consumption charges and rates is R18 168.30.

[13] The assistance which the plaintiff indicates it provided to the defendants prior to instituting the action, was for its representatives to make several attempts to contact the defendants with a view to them entering into a repayment arrangement, restructure agreement and / or the sale of the immovable property. In support of this allegation, the

[1] Paragraphs 18 to 21, page 14 of the indexed papers

plaintiff relies on annexure '**JKN6**' to the papers which alludes to email correspondence exchanged between the plaintiff's attorneys and the defendants.

[14] There are further allegations of attempts made on 6 September 2021 and 8 November 2021, however this email correspondence has not been annexed to the papers nor is there confirmation of what options were made available to the defendants.

[15] The founding affidavit of Ms Ngcobo was deposed to and commissioned on 26 November 2021 at Durban before an attorney. In doing so, Ms Ngcobo declared under oath that the contents of the affidavit were true and correct and were within her personal knowledge having regard to her designation in the plaintiff.

[16] When the matter served before me in motion court on 1 February 2022, Advocate Mfayela appeared for the plaintiff and I raised with her certain allegations made by Ms Ngcobo in the founding affidavit which were not borne out by the annexures. These related to the defendants' arrears, payment history and the assistance offered to the defendants before the action was instituted. The application was adjourned to 14 February 2022 for these to be addressed by way of a supplementary affidavit. A supplementary affidavit was filed by the plaintiff deposed to once again by Ms Ngcobo.

[17] In such supplementary affidavit, Ms Ngcobo indicates that on 1 February 2022, I noted a discrepancy in the founding affidavit dealing with the first and second defendant's payment history and such discrepancy was a regrettable oversight resulting from the defendants not making payments directly into their home loan account but by making use of the plaintiff's general ledger account.

[18] Ms Ngcobo indicated in paragraph 5 of the supplementary affidavit that the purpose of the affidavit was to supplement the founding affidavit by placing the correct payment history of the defendants before the court and secondly, to record a further attempt made by the plaintiff's attorney of record to resolve the matter with the defendants on 7 February 2022, after the institution of proceedings and after the founding papers were deposed to.

Analysis

[19] Rule 46A provides:

‘(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2) (a) A court considering an application under this rule must —

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

(3) Every notice of application to declare residential immovable property executable shall be —

(a) substantially in accordance with Form 2A of Schedule 1;

(b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided

that the court may order service on any other party it considers necessary;

(c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and

(d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.

(4) (a) The applicant shall in the notice of application —

(i) state the date on which the application is to be heard;

(ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;

(iii) appoint a physical address within 15 kilometres of the office of the registrar at which the applicant will accept service of all documents in these proceedings; and

(iv) state the applicant's postal, facsimile or electronic mail address where available.

(b) The application shall not be set down for hearing on a date less than five days after expiry of the period referred to in paragraph (a)(ii).

(5) Every application shall be supported by the following documents, where applicable, evidencing:

(a) the market value of the immovable property;

(b) the local authority valuation of the immovable property;

(c) the amounts owing on mortgage bonds registered over the immovable property;

(d) the amount owing to the local authority as rates and other dues;

(e) the amounts owing to a body corporate as levies; and

(f) any other factor which may be necessary to enable the court to give effect to subrule (8):

Provided that the court may call for any other document which it considers necessary.

(6) …

(7) …

(8) A court considering an application under this rule may —

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b) order the furnishing by —

(i) a municipality of rates due to it by the judgment debtor; or

(ii) a body corporate of levies due to it by the judgment debtor;

(c) on good cause shown, condone —

(i) failure to provide any document referred to in subrule (5); or

(ii) delivery of an affidavit outside the period prescribed in subrule (6)(d);

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

…'

[20] The provisions of rule 46A are quite clear and sub-rule (3)(*c*) requires every application to be supported by an affidavit setting out the reasons for the application and the grounds on which it is based. The sub-rule uses the word "**shall**" signifying a peremptory act. Rule 46A(5) also uses the word "**shall**" and is equally of a peremptory nature in setting out the documents that must accompany the application and supporting affidavits.

[21] At this juncture I am mindful of the judicial trend to jettison the "mechanical approach" of drawing formal distinctions between mandatory or peremptory provisions on the one hand and directory provisions on the other.[2] In *African Christian Democratic Party vs Electoral Commission & others* [3] the court held the following

"[25] The question thus formulated is whether what the applicant did constituted

[2] Minister of Police and Others vs Samuel Molokwane (730/2021) [2022] ZASCA 111(15 July2022) at paras 11 to 15.
[3] (CCT 10/06) [2006] ZACC 1; 2006(3) SA 305 (CC); 2006(5) BCLR 579 (CC) (24 February 2006) at para 25.

compliance with the statutory provisions viewed in the light of their purpose. A narrowly textual and legalistic approach is to be avoided as Olivier JA urged in *Weenen Transitional Local Council v Van Dyk*:

'It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the Legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 434A - B). Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether "shall" should be read as "may"; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori*, not *a priori* significance. The approach described above, identified as ". . . a trend in interpretation away from the strict legalistic to the substantive" by Van Dijkhorst J in *Ex parte Mothuloe* F *(Law Society, Transvaal, Intervening)* 1996 (4) SA 1131 (T) at 1138D - E, seems to be the correct one and does away with debates of secondary importance only.'

[22] Regard being had to these interpretative iterations, I find that for the reasons that appear hereunder, that the Legislature could only have intended that strict compliance is required in these rules, in so far as practically possible given the far reaching and dire consequences of granting an Order declaring a person’s residential property executable and subject to being sold in Execution.

[23] Sub-rule 8 sets out what a court is empowered to do when it considers an application in terms of the provisions of rule 46A. These include refusing an application if

it has no merit and making any other appropriate order.

[24] It is trite that in proceedings involving execution of a primary residence, rule 46A has been enacted to protect the constitutional right to adequate housing recognised in s 26 of the Constitution. The need for judicial oversight in such applications and the reasons therefore have been the subject matter of a number of court applications in the Supreme Court of Appeal, Constitutional Court and individual divisions of the High Courts. The institution of legal proceedings and execution have been recognised to be the avenue of last resort.

[25] An important, yet distinguishable case, that warrants mention is *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*.[4] I say distinguishable because the facts in this case are quite unique. This case analyses the relationship between s 26 of the Constitution and the effect of a sale in execution. Here, the immovable property was a state-subsidised home. While the court agreed that s 26 rights can be limited, it directs a creditor to look at alternative methods, if any exists, and to weigh the impact that executions can have on debtors.

[26] The court in *Jaftha* further provided guidance in the exercise of judicial oversight. If proper procedure, as set out in Rules, is not followed, a sale in execution cannot be allowed. The amount of the debt and the circumstances on which it arose must be considered – there must not have been an abuse of process. Finally, the court encourages the creditor to look at alternative ways to recover the debt, other than a sale in execution of the immovable property.

[27] The Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson and others*[5] and *Nedbank v Mortinson*[6] set out rules of practice which have to be followed by the various local divisions of the High Court when dealing with these applications.[7]

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[4] Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC).
[5] Standard Bank of South Africa Ltd v Saunderson and others 2006 (2) SA 264 (SCA).
[6] Nedbank Ltd v Mortinson 2005 (6) SA 462 (W) paras 33-34.
[7] Gundwana v Steko Development 2011 (3) SA 608 (CC) – even though this court overruled the decisions of Saunderson and Mortinson to the extent that they held that registrars are constitutionally competent to

One of those rules listed in *Mortinson* is that in applications for default judgments where the applicant is seeking specially hypothecated immovable property to be declared executable, the affidavit must include the amount outstanding as at date of application for default judgment. The courts have recognised that applications for default judgment and for the execution of immovable property ought to be dealt with in a single application and to avoid piecemeal adjudication of applications.[8]

[28] The reasoning behind the amendments to rule 46A and the need for judicial oversight are to protect the constitutional rights guaranteed in s 26 and to inter alia ensure a person is not evicted from their home without an order of court and after consideration of all of the circumstances relevant to a particular case. Thus, our courts require full disclosure of all relevant facts as this can impact the court's discretion on whether or not to grant the execution.[9] Our courts have not attempted to prescribe the factors which a court should consider as this would have the effect of limiting the overall discretion of a court. However, among the factors which the court must consider are the circumstances under which the debt was incurred and any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; and whether the debtor is employed or has a source of income to pay off the debt and any other relevant factor pertinent to the particular facts of a case.

[29] In addition, as part of the execution process, the courts require, in circumstances where default judgment is being asked for and execution is to be levied against a primary residence, personal service on the debtor/s. The court must be approached for an order, where personal service is not possible and the creditors want to attempt service in any other manner.[10]

[30] It is evident that the founding affidavit in support of the application for default judgment and rule 46A orders were deposed to and signed by Ms Ngcobo on 26

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make execution orders, the court did not disregard the practical guidance offered by the two cases.
[8] Absa Bank Ltd v Mokebe and Related cases 2018 (6) SA 492 (GJ) para 13
[9] Mokebe para 12.
[10] Standard Bank of South Africa Limited v Hendricks and another and related cases 2019 (2) SA 620 (WCC) paras 30-33.

November 2021. There is no personal service of the summons nor the application papers. There is no explanation either in the founding affidavit or supplementary affidavit indicating why personal service was not effected and what attempts the plaintiff took to establish whether that still is the primary residence of the defendants.

[31] All the plaintiff does in the supplementary affidavit is make an allegation in paragraph 7.3 that the independent valuer could not gain access to the property and it appeared to be occupied by unknown occupants. These occupants have not been identified.

[32] Having regard to the affidavit, incorrect averments were made by Ms Ngcobo under oath. I do not accept this was a mere discrepancy as alluded to in the supplementary affidavit. Counsel who appeared on both occasions was pertinently informed that the supplementary affidavit had to explain why Ms Ngcobo deposed to and signed an affidavit and confirmed allegations as being true and correct, given her designation and when they were clearly not true and not supported by the contents of the plaintiff's own annexures.

[33] This was not dealt with in the supplementary affidavit nor could counsel, who appeared on 17 February 2022, address this aspect. Despite the question being raised with him and asked of him on no less than three separate occasions, he could not answer why she deposed to an affidavit maintaining the allegations were true and correct when in actual fact they were not. The fact that she, in her supplementary affidavit, indicates that that this was a discrepancy is not correct. This could not have been a discrepancy on her part. She is the official who had regard to the bank records and clearly what she deposed to was not correct.

[34] Her explanation that payments were made into the general ledger account was already known to her at the time she deposed to the original founding affidavit as it forms part of the annexures to the papers and is reflected in the payment history. It could not thus be a discrepancy. The payment history clearly shows that the last payment effected on the home loan account was on 19 May 2021 in the amount of R10 000 and therefore

her allegation that the last payment was made on 7 May 2020 in the amount of R6202.13 was false.

[35] What is also evident from the payment history read together with the allegations in the combined summons is that the defendants first ran into problems with payment in 2019. Some arrangements must have been made and concluded because apart from the current instalment, they made monthly payments of R10 000 which were accepted by the plaintiff. Both the founding and supplementary affidavits do not provide any explanation regarding the payment arrangements or why an amount of R10 000 a month was paid toward the instalment.

[36] In addition, the only attempts made by the plaintiff to assist and resolve the matter before resorting to the institution of legal proceedings, which is borne out by the annexures to the affidavit, were on 23 July 2021 which were responded to by the debtor on 28 July 2021. That there must have been a prior arrangement made to settle the arrears and to keep up the payments in the sum of R10 000 is borne out by this email exchange. Why this was not disclosed in the papers is also not dealt with.

[37] What is not clear is when the eight telephone calls were made and the SMSes were sent and what attempts were made immediately prior to the institution of the application apart from the email exchange in July. There are no supporting documents nor corroborating averments in the affidavit indicating what was done by the plaintiff in November and September. In fact, the supplementary affidavit is indicative that attempts were made to resolve the matter with the defendants after the institution of the application and after it first served before court on 1 February 2022, if one has regard to the letter dispatched by the plaintiff's attorneys on 7 February 2022.

[38] Given the serious nature of these proceedings and the fact that defendants stand to lose their primary residence, one would expect a deponent to the affidavit to disclose all circumstances and to accurately disclose the circumstances in a founding affidavit. To say that this was a discrepancy pointed out by the court is factually incorrect and may well amount to an act of perjury. The deponent to the affidavit clearly deposed to an

affidavit concerning allegations which were not true.

[39] She had documents in her possession prior to deposing to the affidavit on 23 November 2021. In addition, this application would have been drafted by the attorneys of record who would also have had the documents in their possession and who ought to have verified this before the affidavit was deposed to. The attorneys were either remiss or negligent in their obligations not only to the court but to the bank official to ensure that she deposed to an affidavit which was factually correct.

[40] Despite this being pointed out to the plaintiff's representative as well as the advocate who appeared for the plaintiff on no less than two occasions, nothing was done to provide an explanation as to why she deposed to an affidavit knowing the contents thereof not to be true. Two opportunities were given to the plaintiff to take the court into its confidence and to admit the irregularity. However, it failed to do so and did not provide any explanation for this perjurious conduct. In fact the supplementary affidavit perpetuates the situation.

[41] In the result, in keeping with the principle of judicial oversight and the duty of a bank official as well as a plaintiff to make full and frank disclosure in an affidavit and disclose all relevant circumstances to a court in such application which has dire consequences for defendants, I have no alternative but to refuse the application for default judgment as well as execution.

[42] It is becoming common practice and more often than not Judges encounter these applications on the unopposed motion court roll. The impression created is that these applications are prepared by an amanuensis and are copied and pasted from previous applications. No one checks them properly to ensure that they are in order.

Costs

[43] The conduct of the attorney and bank official is to be deprecated and the only suitable way apart from refusing the application is to ensure that the costs of the

application not be recovered from the debtors or levied by the attorney of record.

[44] Attorneys representing judgment creditors are subject to the same obligations, if not an even greater standard. As officers of the Court, and in maintaining the highest standards of the profession, the obligation on Legal Practitioners cannot be compromised or diminished in any manner whatsoever.

[45] Judgment creditors are required to make full disclosure of all attempts made to assist the debtors and full and frank disclosure of all relevant circumstances. More often than not these applications are seldom opposed by the debtors and the court relies solely on the contents of the founding affidavit and supporting annexures. A presiding officer must be able to rely on what is contained in such affidavit.

[46] It is for these reasons in addition I am going to direct that the judgment and application papers be sent to the Legal Practice Council, KwaZulu-Natal and to the Banking Services Ombudsman.

Conclusion

[47] In the result, I grant the orders set out in the preamble hereto.

J I Henriques, J
Judge of the High Court

Case Information

NB. This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for delivery is

deemed to be 09h30 on 4 August 2022.

Date of hearing:	1,14,17 February 2022
Date of Judgment:	4 August 2022

Counsel for the Applicant:	Advocate SN Mfayela and B Jackson
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First and Second Defendants:	No Appearance