

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

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| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

SIGNATURE

DATE: 7 February 2023

Case No. 27485/2013

In the matter between:

ABSA BANK LIMITED

Applicant

and

GONTSANA, XOLILE ERIC

First Respondents

GONTSANA, BEATRICE

Second Respondent

Summary

Sale-in-execution of a primary residence – ten-year delay between granting of order declaring property specially executable, and steps to arrange the sale-in-execution - court empowered to suspend the order granting leave to execute pending provision of further information disclosing whether execution on the original judgment remains proportionate within the meaning of the decision in *Gundwana v Steko Development* 2011 (3) SA 608 (CC).

JUDGMENT

WILSON J:

- 1 The applicant, ABSA, is the mortgagee of a two hundred and thirty square metre property in Orange Farm. The respondents, the Gontsanas, mortgaged the property in 2007, and appear to have resided there since at least that time. Although ABSA has not produced the home loan agreement the Gontsanas allegedly signed, it appears that the principal debt secured by

the mortgage bond is R65 000. The monthly instalments payable in terms of the home loan agreement were said to be R548.03.

- 2 By February 2013 the Gontsanas had fallen into arrears of R7 935.85. ABSA called up the bond and sought judgment for the full accelerated amount payable, and an order declaring the Orange Farm property specially executable. On 14 November 2013, Mali AJ granted judgment for R60 397.37 plus interest and costs. She also made an order declaring the property specially executable. Mali AJ suspended her order for three months, in order to give the Gontsanas the opportunity to bring payments on their account up to date.
- 3 For reasons that are not clear from the papers, ABSA then declined to execute Mali AJ's order for almost a decade. During that time, the Gontsanas paid what they could. By December 2022, they had paid just over R55 000 to ABSA. This was obviously insufficient to discharge the judgment debt plus interest and costs, but it does suggest that the Gontsanas made a serious and sustained effort, over a number of years, to make good on their obligations.
- 4 During the near-decade that elapsed after Mali AJ's order was made, Rule 46A of the Rules of this Court came into effect. Rule 46A (9) requires a court to consider whether an order authorising a sale-in-execution of a person's home should be subject to a reserve price being set at the sale. Mali AJ's order, having been made some four years before Rule 46A came into effect, did not set a reserve price. It is unlikely, for obvious reasons, that Mali AJ considered whether a reserve price should be set.

- 5 To address that difficulty, on 14 December 2022, ABSA instituted an application for three orders, each sought in the alternative to the others. In the first instance, ABSA sought an order directing that the Orange Farm property should be sold in terms of Rule 46A, without a reserve price. Failing that, ABSA asked for an order selling the property in terms of Rule 46A, subject to a reserve price to be determined in terms of that Rule. The third alternative ABSA sought was an order authorising the sale of the property as if Rule 46A had never been promulgated.
- 6 The application was served personally on the Gontsanas on 20 December 2022, and was placed on my unopposed motion roll on 16 January 2023. When the matter was called, I raised with Mr. Naude, who appeared for ABSA, the absence of any attempt in ABSA's founding papers to explain the decade-long delay between Mali AJ's order and the institution of the application brought before me. I was particularly concerned that nothing was said about the Gontsanas' behaviour after ABSA obtained judgment. It was a fair inference that something had happened to prevent ABSA from executing against the Gontsanas' property. It seemed to me that the most likely reason for the delay was that the Gontsanas had come to some arrangement with ABSA to pay off the judgment debt, and to stave off execution against their home. It was at least likely that ABSA had agreed not to proceed on Mali AJ's judgment, and may have irrevocably waived its right to do so. It was also possible that the Gontsanas had reinstated their credit agreement in terms of section 129 (3) of the National Credit Act 34 of 2005 ("the National Credit Act").

- 7 Mr. Naude was unable to make any meaningful submissions about the cause of the delay, or the extent to which the Gontsanas had been able to make payment towards the judgment debt. Accordingly, I reserved judgment, and granted ABSA an opportunity to file an affidavit dealing with the issues I had raised.

ABSA's supplementary affidavit

- 8 ABSA delivered that affidavit on 27 January 2023. The affidavit, deposed to by a Ms. Europah Mdluli, a legal secretary employed at ABSA's attorney of record, takes the matter little further. It confirms that on 14 April 2014 ABSA "instructed [its attorneys] to pend legal action and took certain steps to make arrangements with" the Gontsanas. The affidavit does not say what those arrangements were, or on what terms ABSA's right to execute against the Gontsanas' property was "pended". Instead, I was referred to extracts from what ABSA calls its "DM system". These extracts appear to be records of telephone conversations between Mrs. Gontsana and an ABSA representative, in which Mrs. Gontsana sought opportunities to restructure the Gontsanas' payments. More than that I cannot say, as the records are replete with jargon, unexplained abbreviations and "Result Codes". They are unintelligible as a result.

- 9 Annexed to Ms. Mdluli's affidavit is a history of credits and debits on the Gontsanas' loan account. That document makes clear that ABSA decided not to proceed on Mali AJ's judgment. Instead, it accepted, over a period of ten years, payments equal to the lion's share of the capital amount secured by the mortgage bond. It appears to have accepted those payments as

payments on the loan account, not payments in reduction of the judgment debt. The Gontsanas were charged interest at a variable rate, often substantially in excess of the fixed rate of 9.5% authorised in Mali AJ's judgment. The "arrears" on the account continued to escalate and interest continued to be compounded monthly, on the instalments and on a capital amount that would have been due under the loan agreement, not on the judgment debt.

Waiver

- 10 ABSA's acceptance of payments from the Gontsanas while still operating the Gontsanas' account as if Mali AJ's judgment had never been taken naturally raises the question of whether ABSA's conduct during that time amounted to a waiver of its right to execute, or an outright abandonment Mali AJ's judgment.
- 11 Ultimately, however, though the Gontsanas might reasonably have thought that ABSA had abandoned Mali AJ's order, I cannot conclude that such an abandonment is the necessary inference to be drawn from ABSA's conduct. The ten-year delay in acting on Mali AJ's judgment could also be explained by an extraordinary act of leniency. Given the Gontsanas' modest means, and the relatively low value of the loan, ABSA's conduct is consistent with a decision to give the Gontsanas multiple opportunities to make good on the debt, before turning to execution.
- 12 However, if there was leniency, then there was also carelessness. Apart from the garbled records of conversations between Mrs. Gontsana and what appears to be ABSA's call centre, I have not been presented with any facts

that suggest that ABSA ever engaged with the Gontsanas, much less that it did so in a meaningful way. ABSA adopted an essentially hands-off approach for nearly ten years, before applying to me to finalise the execution process on less than a month's notice to the Gontsanas. If ABSA really wanted to assist the Gontsanas, its efforts to do so were ineffectual.

- 13 Whatever its true motive, ABSA's conduct tends to imply that it wished to preserve the option of executing Mali AJ's order all along, and that it sought to exercise that option by bringing this application before me. I am accordingly unable to conclude that ABSA's conduct meets the requirements for a waiver or abandonment of its rights under Mali AJ's judgment. To reach that conclusion, I would have to be satisfied that ABSA's conduct was "plainly inconsistent" with any intention to enforce Mali AJ's order (see *Laws v Rutherford* 1924 AD 261 at 263). For the reasons I have given, I cannot be so satisfied.

Proportionality of execution and abuse of process

- 14 However, since this application is concerned with execution against the Gontsanas' home, that is not the end of the matter. ABSA's application to proceed with execution, with or without a reserve price, implicates the Gontsanas' rights of access to adequate housing under section 26 of the Constitution, 1996. I cannot grant any of the relief ABSA now claims unless I am satisfied that it would be a lawful and proportionate response to the Gontsanas' alleged default (see *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC), paragraph 54). The proportionality of the relief ABSA

claims must be evaluated on the facts as they stand now, not the facts as they were almost ten years ago.

15 Generally speaking, execution against a debtor's home is neither lawful nor proportionate if it amounts to an abuse of process (*Firststrand Bank v Folscher* 2011 (4) SA 315 (GNP) paragraph 40). An abuse of process "takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective" (*Beinash v Wigley* 1997 (3) SA 721 (SCA) at 734F).

16 I can think of few clearer instances of an abuse of process on the *Beinash* definition than ABSA's conduct in this case. ABSA advanced a loan to an impecunious family in one of South Africa's poorest townships. When the Gontsanas failed to repay that loan, ABSA took judgment. Having obtained judgment and the right to execute, it then left that judgment to lie fallow for ten years, all the while accepting payments and no doubt contributing to the impression that it was no longer interested in executing against the Gontsanas' property. After that decade had elapsed, it approached me on the basis that I need only decide what ABSA considers to be the technical matter of whether a reserve price should be set. Despite being given the opportunity to do so, ABSA has not adequately explained what happened in the ten years during which it declined to execute, why it applied the Gontsanas' payments to their loan account, and not in reduction of the judgment debt, and why it recently decided to reverse its course and execute against their home after all.

17 This conduct is not merely “extraneous” to the pursuit of truth. It is incompatible with that pursuit.

Appropriate relief

18 In these circumstances, execution cannot be authorised. It is true that, unless I definitively hold that ABSA abandoned its right to execute, I cannot set Mali AJ’s judgment aside. However, in cases like this, where there has been such a long delay between judgment and execution, and it appears that the facts may no longer justify execution against a person’s home, a court should not hesitate to exercise its discretion to suspend the execution of an order under Rule 45A, on appropriate terms.

19 Courts regularly suspend special execution orders to allow a debtor the chance to make good on their arrears. Mali AJ’s order exemplifies that practice. A court need only be satisfied that suspension is in the interests of justice. That entails an examination of whether the person against whom the court order operates will suffer an injustice if the order is not suspended, and whether a suspension would be unduly prejudicial to the person in whose favour the order was granted (see, in this respect *Soja Ltd v Truckers Land Development Corporation* 1981 (2) SA 407 (W), at 411E-F).

20 In this case, the Gontsanas face the loss of their home in a context where the facts suggest that result may well be disproportionate. But a number of facts relevant to the fairness and proportionality of execution against the Gontsanas’ home remain obscure. The principal obscurity is the sum that remains outstanding from the judgment ABSA obtained from Mali AJ. Not having abandoned that judgment, ABSA was bound to apply the amounts

received from the Gontsanas in reduction of the judgment amount. It was not entitled to continue to operate the Gontsanas' loan account as if the judgment was never taken, unless, of course, the effect of the Gontsanas' post-judgment payments was to reinstate the loan agreement under section 129 (3) of the National Credit Act. It seems clear on the payment history provided to me that this did not happen.

- 21 Once what remains of the judgment debt has been calculated, it may be possible to explore the avenues available to enable the Gontsanas to pay it off, and whether in light of the quantum remaining, and the Gontsanas' capacity to repay that amount, it would be proportionate to authorise execution against them.
- 22 ABSA will have to be given a further opportunity to address these issues. Pending the outcome of that inquiry, the suspension of Mali AJ's order granting leave to execute against the Gontsanas' home is plainly appropriate.
- 23 ABSA complains in its supplementary affidavit that a further delay means that it "will continue to be deprived of its rights as [a] credit provider". In circumstances where ABSA itself delayed execution for nearly a decade, and then declined adequately to explain its sudden change of heart at the end of 2022, that submission must be rejected.
- 24 Assuming in ABSA's favour that its conduct over the last ten years evinces a genuine effort to assist the Gontsanas, it is as well to make sure that ABSA goes about that endeavour in a structured and transparent way, rather than in the haphazard and opaque manner that appears to have characterised its

efforts to date. My order will make provision for a process of engagement between ABSA and the Gontsanas that will not only allow the court to consider whether execution against the Gontsanas' property is ultimately justified, but will also afford the Gontsanas a genuine opportunity to meet their obligations under Mali AJ's order.

Order

25 For all of these reasons, I make the following order –

25.1 The application is dismissed.

25.2 Paragraph 4 of the order of Mali AJ, dated 14 November 2013, is suspended.

25.3 The applicant is directed, by no later than 1 March 2023, to cause personal service on the respondents, via sheriff, of a copy of this judgment, together with a notice –

25.3.1 setting out what remains unpaid of the judgment granted in paragraphs 1, 2 and 3 of Mali AJ's order; and

25.3.2 inviting the respondents to make a proposal within one month of the date of service of the notice to pay off that amount over a reasonable period; and

25.3.3 giving the name and contact details of an appropriately empowered official of the applicant who can receive and respond to that proposal.

25.4 The applicant may apply to this court, on notice served personally on the respondents, not earlier than 17 July 2023, to lift the suspension of paragraph 4 of the order of Mali AJ.

25.5 In that application, the applicant must –

25.5.1 address the content of this judgment;

25.5.2 demonstrate its compliance with this order; and

25.5.3 disclose such proposals as have been received from the respondents to reduce the judgment debt, together with the applicant's response to those proposals.

25.6 There is no order as to costs. The applicant may not recover the costs of this application, or any further action it is required to take in terms of this order, from the respondents.

S D J WILSON
Judge of the High Court

HEARD ON: 16 January 2023

FUTHER AFFIDAVITS ON: 27 January 2023

DECIDED ON: 7 February 2023

For the Applicant: W Naude
Instructed by Smit Sewgoolam Inc