

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

In the referral to the Full Court of the following matters:

**ABSA BANK LIMITED
and
D K MOKEBE**

CASE NO: 2018/00612
Plaintiff
Defendant

AND

**ABSA BANK LIMITED
and
R L KOBE**

CASE NO: 2017/48091
Plaintiff
Defendant

AND

**ABSA BANK LIMITED
and
M N VOKWANA**

CASE NO: 2018/1459
Plaintiff
Defendant

AND

**THE STANDARD BANK OF SOUTH AFRICA LIMITED
and
ILLAN SAMSON COLOMBICK
PAMELA ELVINE KIMBERG**

Plaintiff
First Defendant
Second Defendant

AND

**INVESTEC BANK LIMITED
NATIONAL CREDIT REGULATOR
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA
LEGAL AID SOUTH AFRICA
LAW SOCIETY OF SOUTH AFRICA
LUNGELO LETHU HUMAN RIGHTS FOUNDATION**

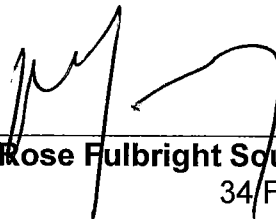
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**FILING SHEET: STANDARD BANK'S HEADS OF ARGUMENT AND LIST OF
AUTHORITIES**

Document presented for service and filing:

Standard Bank's heads of argument and list of authorities

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R L KOBE	Defendant

AND

ABSA BANK LIMITED	CASE NO: 2018/1459
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M N VOKWANA	Defendant

AND

THE STANDARD BANK OF SOUTH AFRICA LIMITED	CASE NO: 2017/35579
and	Plaintiff
ILLAN SAMSON COLOMBICK	First Defendant
PAMELA ELVINE KIMBERG	Second Defendant

AND

INVESTEC BANK LIMITED	<i>Amicus Curiae</i>
NATIONAL CREDIT REGULATOR	<i>Amicus Curiae</i>
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	<i>Amicus Curiae</i>
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STANDARD BANK'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION	2
THE REFERRAL TO THE FULL COURT	5
BACKGROUND AND CONTEXT.....	6
<i>The importance of reliable and predictable mortgage agreement enforcement</i>	<i>6</i>
<i>The necessary steps before a sale in execution can occur.....</i>	<i>10</i>
<i>Standard Bank's approach to defaulting debtors.....</i>	<i>13</i>
THE COLOMBICK MATTER.....	15
<i>Standard Bank's efforts to engage with the Defendants.....</i>	<i>16</i>
<i>Institution of legal proceedings.....</i>	<i>19</i>
<i>An order for the full outstanding balance and an order declaring the property specially executable is warranted.....</i>	<i>21</i>
A DISCRETION TO POSTPONE IMMEDIATE MONEY JUDGMENT	21
<i>Courts do not have a discretion to postpone money judgments.....</i>	<i>21</i>
<i>The amici curiae have failed to demonstrate the impact of the money judgment on the right to housing.....</i>	<i>27</i>
<i>The Practice Manual requires reconsideration</i>	<i>31</i>
UNIFORMITY OF TREATMENT	34
THE PROPER INTERPRETATION OF SECTION 129(3) AND (4) OF THE NCA ...	40
<i>The purpose of the statute and the provisions</i>	<i>45</i>
<i>The spirit, purport and objects of the Bill of Rights.....</i>	<i>45</i>
THE DESIRABILITY OF AN IMMEDIATE MONEY JUDGMENT	46
THE SETTING OF A RESERVE PRICE	49
CONCLUSION.....	54
LIST OF AUTHORITIES.....	55

INTRODUCTION

- 1 This case concerns the proper approach to foreclosures on home loans, where the home is the debtor's primary residence.
- 2 It raises important questions about the discretion of courts to postpone immediate money judgments, the proper interpretation of the re-instatement provisions of the National Credit Act 34 of 2005 (the "**NCA**"), and the setting of reserve prices.
- 3 Standard Bank adopts a position, which, we submit, is practical and sensible, and is grounded in the language and purposes of the NCA and the Constitution. It also appropriately balances the rights of credit providers and consumers, as is required by the NCA.¹
- 4 In sum, Standard Bank adopts the following approach to the issues raised by the Practice Directive:
 - 4.1 In relation to issue 6(a) of the Practice Directive, the Court does have a discretion, in appropriate circumstances, to postpone the order declaring a primary residence executable. However, the Court does not have any discretion to postpone an immediate money judgment for the accelerated full outstanding balance under a home loan. To hold otherwise would undermine commercial contracts and would, quite impermissibly, put

¹ *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) at para 20.

secured creditors in a worse position than unsecured creditors.

4.2 Issues 6(b) and (c) are irrelevant as the Court does not have a discretion to postpone an immediate money judgment for the accelerated full outstanding balance under a home loan. In any event, Standard Bank submits that the uniformity that is required relates to when to suspend the order declaring a primary residence specially executable. In this regard, Standard Bank submits as follows:

4.2.1 Where the debtor is what may be termed a “serial defaulter” (he or she has defaulted six or more times during the agreement by the time the matter is heard by the court) or where debtor’s arrears are equivalent to more than three months of home loan repayments by the time the matter is heard by the court, the court should grant both the full money judgment and the order declaring the property specially executable, neither of which should be suspended.

4.2.2 However, where the debtor is not a serial defaulter and where the debtor’s arrears are also equivalent to three months of home loan repayments or less by the time the matter is heard by the court, the Court should grant the full money judgment and the order declaring the property executable, but may direct that no sale in execution may take place for a period of six months following the order – thus effectively suspending the execution order for six months. Such an order suspending

execution should only be made where execution would be disproportionate or would constitute an abuse.

- 4.3 In relation to issue 6(d), Standard Bank submits that, properly interpreted and giving effect to the to the spirit, purport and object of the Bill of Rights, section 129(3) and (4) of the NCA do not preclude reinstatement of a home loan agreement by a consumer where there has been execution against movables.
- 4.4 In relation to issue 6(e), Standard Bank submits that it is desirable as a matter of policy that the money judgment is granted immediately. In this regard:
- 4.4.1 money judgments have the effect of bringing debtors into compliance with their payment obligations, ultimately helping to ensure that they keep their homes; and
- 4.4.2 to the extent that a money judgment is granted, and the arrears is subsequently paid up, the judgment is rendered "*without force and effect*", thus already protecting the consumer; and
- 4.4.3 consequently, there would be no need to have them set aside or declared null and void.
- 4.5 In relation to issue 7, Standard Bank submits that the Court has a discretion to set a reserve price, but, having regard to the potentially harmful consequences of doing so, it should do so with caution, and not as the default position.

- 5 The remainder of these submissions are structured as follows:
- 5.1 First, we briefly explain how this matter comes before the Full Court;
 - 5.2 Second, we set out the contextual backdrop against which this matter should be understood;
 - 5.3 Third, to the extent necessary, we deal with the facts of the *Colombick* matter;
 - 5.4 Fourth, we offer submissions on each of the issues raised in the Practice Directive.

THE REFERRAL TO THE FULL COURT

- 6 On 13 April 2018, this Court (per Van der Linde J) heard four applications to foreclose on home loans – three brought by Absa Bank Limited (“**Absa**”) and one by Standard Bank (collectively, the “**Banks**”).
- 7 In their respective pleadings, the Banks sought:
- 7.1 a money judgment for the accelerated full outstanding balance of the home loan; and
 - 7.2 an order declaring the property immediately executable.
- 8 Van der Linde J noted the inconsistent and disharmonious approach that had arisen in the court’s practices regarding the granting of orders of this kind. He also explained that these matters raise common and important issues relating to:

- 8.1 the court's function under section 26(3) of the Constitution;
 - 8.2 the meaning and applicability of section 129(3) and (4) of the NCA;
 - 8.3 the meaning and effect of the new Rule 46A, promulgated on 22 December 2017, and the court's function under that rule; and
 - 8.4 the application of the local Practice Manual to applications of this kind.
- 9 In consultation with the Judge President, van der Linde J accordingly referred the matters to a Full Court for further hearing in terms of section 14(1)(b) of the Superior Courts Act 10 of 2013.
- 10 On 2 May 2018, the Judge President issued a Practice Directive (the "**Practice Directive**") detailing the questions of law to be dealt with by the Full Court, and inviting *amici curiae* to seek admission.²
- 11 Pursuant to the Practice Directive, six parties sought admission as *amici curiae*.

BACKGROUND AND CONTEXT

The importance of reliable and predictable mortgage agreement enforcement

- 12 A key objective of the NCA is to enhance access to credit. This objective arises from a recognition that access to credit is a vital component of any modern

² Practice Directive, Vol 1, p 12.

commercial system, and that its widespread availability drives economic growth, and enables those without capital to make life-changing investments.³

- 13 One species of credit is a home loan secured by a mortgage bond. Bond finance is a particularly important instrument, which enables people, who might not otherwise be able to do so, to acquire their own home. Its essence is that the immovable property of the debtor is used to secure a home loan.⁴ As the Full Court held in *Folscher*:⁵

“Bond finance is an important socioeconomic tool, enabling individuals to acquire their own home, to make the most important investment of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital.”

- 14 But credit does not simply appear. It is provided by banks and other financial institutions. Credit providers, such as banks, can only offer credit if they can be reasonably certain that they will be reimbursed. The ability of credit providers to provide reliable and *low-cost* credit, depends, therefore, on confidence in the mechanisms to recover payment.⁶

³ Standard Bank Supplementary Affidavit (“SA”), Vol 2, para 14, p 84.

⁴ Standard Bank SA, Vol 2, para 19, p 85.

⁵ *Firststrand Bank Ltd v Folscher and Another and Similar Matters* 2011 (4) SA 314 (GNP) (“Folscher”) para 39.

⁶ Standard Bank SA, Vol 2, para 15, p 84.

- 15 Appropriate and effective remedies for lenders are thus indispensable to keeping the cost of credit low. The more consumers default, and the less that credit providers are able to recover payment by means of enforcement mechanisms, the higher the cost of credit must become, and the less *accessible* credit becomes.⁷
- 16 Therefore, as our courts have recognised, there is a significant degree of convergence between the interests of credit providers and consumers. As the Court held in *Fraser*:

“Viewing considerations on a macroeconomic level beyond the parochial concerns of individual litigants, the two social values are not so much juxtaposed as symbiotic. To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilise the immovable property from commerce, thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons - those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. Furthermore, it would lock up capital and prevent the home owning entrepreneur from using his or her home as security to finance business initiative.”⁸

⁷ Standard Bank SA, Vol 2, para 17, p 85.

⁸ *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) (“*Fraser*”), para 21.

- 17 The same approach was adopted in *Jaftha v Schoeman*, where the Constitutional Court explained that “[t]he need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.”⁹
- 18 Effective debt recovery does not only concern the relationship between an individual bank and judgment debtor. Rather, it “permits lenders to extend credit to new entrants in the market” and thus “serves a broader social purpose”.¹⁰
- 19 In short, minimising the level of default, reducing the cost of credit, and making credit more widely available to a greater proportion of the population, is in the common interest. But doing so depends on the existence of effective and appropriate debt enforcement mechanisms. In particular, without the possibility of timeous execution against assets, security is futile. And without security, the business of money lending becomes infinitely more risky and therefore more expensive for ordinary members of the public.
- 20 In addition to these economic considerations, that creditors should obtain the authorisation of a court to exact payment from their debtors is a fundamental aspect of the rule of law.¹¹ Execution mechanisms must be effective if they are

⁹ *Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others* 2005 (2) SA 140 (CC) (“**Jaftha**”) para 58. See also *Standard Bank of South Africa Ltd v Bekker and Another* 2011 (6) SA 111 (WCC) (“**Bekker**”) para 16.

¹⁰ *Mouton v Absa Bank Limited; Haylock v Absa Bank Limited* (Case No: 17922/2014; 24820/2015) (14 July 2017) (“**Mouton**”) para 97.

¹¹ *Baretzky and Another v Standard Bank of South Africa Limited and Others* (“**Baretzky**”) [2017] ZAWCHC 9 (16 February 2017), para 9.

to have legitimacy, and public confidence in them should not be lightly disturbed.

- 21 For these reasons, subject to court oversight, as a general principle a judgment creditor is entitled to enforce its judgment by executing against the immovable property that is bonded as security.¹²

The necessary steps before a sale in execution can occur

- 22 Sales in execution of primary residences are a necessary reality of the secured credit market for homes. As the Constitutional Court held in *Gundwana*:

*"It must be accepted that execution in itself is not an odious thing. It is part and parcel of ordinary economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."*¹³

- 23 However, a sale in execution does not occur lightly. Our legal system ensures that debtors are given every opportunity to retain their home, and that creditors follow a series of legal steps, which provide a series of safeguards for the homeowners concerned.

¹² See, for example, *Gundwana v Steko Developments and Others* 2011 (3) SA 608 (CC) ("**Gundwana**") para 53, and *Jaffa*.

¹³ *Gundwana*, para 54.

23.1 First, a notice in terms of section 129 of the NCA must be delivered drawing the default to the debtor's attention and proposing extrajudicial methods of curing the default.¹⁴

23.2 Second, if the debtor does not respond, the creditor may institute action for the payment of money occasioned by his/her default and for an order declaring the property "*specially executable*". The summons must draw the debtor's attention to section 26(1) of the Constitution and call on him or her to place before the court any information supporting a claim that his or her right to housing will be infringed.¹⁵

23.3 Third, when the debtor receives the summons, he or she can:

23.3.1 oppose the relief sought (should he or she have a defence);

23.3.2 elect not to oppose the relief but nevertheless place information before the court regarding the infringement of his or her rights;
or

23.3.3 do nothing.

23.4 Fourth, if the debtor elects to do nothing, a plaintiff may apply for default judgment. The debtor's founding affidavit must explain:¹⁶

23.4.1 the amount of the arrears outstanding as at the date of the application for default judgment;

¹⁴ See *Sebola and Another v Standard Bank Ltd and Another* 2012 (5) SA 142 (CC) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC).

¹⁵ *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) or [2006] 2 All SA 382 (SCA).

¹⁶ *Nedbank Limited v Mortinson* 2005 (6) SA 462 (W) or [2006] 2 All SA 506 (W); *Gundwana*.

- 23.4.2 whether the immovable property which is sought to be declared executable was acquired by means of or with the assistance of a State subsidy;
- 23.4.3 whether, to the knowledge of the creditor, the immovable property is occupied or not;
- 23.4.4 whether the immovable property is utilised for residential purposes or commercial purposes; and
- 23.4.5 whether the debt which is sought to be enforced was incurred to acquire the immovable property sought to be declared executable or not.
- 23.5 Fifth, the application to declare the property specially executable must be heard by a judge in open court. The debtor is protected by the requirement that a judge must always consider "*all relevant circumstances*".¹⁷
- 23.6 Sixth, a writ of execution is issued and an attachment effected by service of the writ on the judgment debtor and the occupant of the property.
- 23.7 Seventh, a sale in execution is held by way of a public auction.
- 24 It is therefore self-evident that, the mandatory legal processes before a sale in execution can occur are, while necessary, also lengthy, complex and costly.

¹⁷ See *Jaffha*, para 64 and *Fraser*, para 16.

25 Proceeding with this course can be highly unsatisfactory, given the losses that Standard Bank often makes under forced sale conditions. As we illustrate below, Standard Bank seeks to avoid this process if possible, and always seeks to bring its customers out of arrears and into compliance with their payment obligations insofar as it is possible.

Standard Bank's approach to defaulting debtors

26 Standard Bank explained at length in its supplementary affidavit¹⁸ that it offers various arrangements to customers experiencing difficulties in maintaining their monthly loan repayments. These arrangements are available right up until the sale in execution. Therefore, it takes, on average, 29 months (2 years and 5 months) from the date of a debtor's default before Standard Bank sells a property in execution.¹⁹

27 Certain *amici curiae* sought to dispute this, but were only able to do so in the most vague and abstract terms, without referring to any concrete examples.²⁰ We submit that Standard Bank's version has not been seriously challenged and no genuine disputes of fact arise.

28 As a first step, if a customer defaults, Standard Bank always seeks to assist the customer to rehabilitate the home loan account. A customer usually has the

¹⁸ See Standard Bank SA, Vol 2, paras 28-38, pp 87-91.

¹⁹ Standard Bank SA, Vol 2, para 29, p 88.

²⁰ See, in particular, the answering affidavit ("AA") of Lungelo Lethu Human Rights Foundation ("LLHRF"), Vol 6, p 418 and the Socio-Economic Rights Institute ("SERI"), Vol 10, p 709, and the responses in Standard Bank's Replying Affidavit ("RA"), Vol 10, paras 12-20, pp 766-773.

ability to do this from the moment they are in arrears right up until shortly before a sale in execution of the property is due to take place.²¹

29 Litigation is never a strategy of first resort.

29.1 Long before Standard Bank issues summons, its representatives make multiple attempts at communicating and interacting with the customer. Customers are also encouraged to contact Standard Bank if they find themselves in financial difficulty.²²

29.2 On average, a customer, that is not a serial defaulter, is given a minimum of 6 months to either settle the arrears or enter into a payment arrangement, before legal proceedings are instituted.²³

30 Because Standard Bank is not in the business of selling immovable property, it regards sales in execution as a matter of absolute last resort. Thus, in the year ending December 2017:

30.1 Standard Bank obtained orders declaring immovable properties specially executable in respect of 3,043 properties – that is only in respect of 0.53% of its home loan accounts.²⁴

30.2 Of these 3,043 properties, the sales in execution proceeded in only 905 cases, that is in less than 30% of the relevant cases.²⁵

²¹ Standard Bank SA, Vol 2, para 30, p 88.

²² Standard Bank SA, Vol 2, para 31, p 89.

²³ Standard Bank SA, Vol 2, para 34, p 90.

²⁴ Standard Bank RA, Vol 10, para 19.1, p 770.

²⁵ Standard Bank RA, Vol 10, para 19.2, p 770.

30.3 By contrast, the vast majority of matters were resolved before the sale took place, because in the face of the prospect of a sale in execution, debtors took action:

30.3.1 In 1,504 cases (approximately 49% of the matters), the sales in execution were cancelled because the debtor paid the arrears amount or because the debtor entered into a payment arrangement with Standard Bank;²⁶

30.3.2 In 591 cases (approximately 19% of the matters), the sales in execution were cancelled as the debtor opted to sell the property privately.²⁷

31 Therefore, the mere fact that an order declaring immovable property specially executable is granted, even on a non-suspended basis, does not necessarily mean that the property will in fact be sold in execution. As illustrated above, in almost 70% of cases, pursuant to obtaining such orders, debtors had come to an arrangement with the bank or opted to sell the property privately as a result of which, the sale in execution was cancelled.

THE COLOMBICK MATTER

32 As Standard Bank explained in its replying affidavit,²⁸ shortly before its filing, Standard Bank accepted a repayment proposal. In terms of that proposal,

²⁶ Standard Bank RA, Vol 10, para 19.3.1, p 770.

²⁷ Standard Bank RA, Vol 10, para 19.3.2, p 771.

²⁸ Standard Bank RA, Vol 10, para 4, p 764.

provided that Standard Bank receives the first repayment instalment by 31 July 2018, it will not persist with the application for default judgment.

33 Nevertheless, we briefly address the *Colombick* matter given that these heads of argument are due to be filed before the first repayment instalment is due, and it is possible that the payment will not be made. In that event Standard Bank will persist at the hearing of this matter in seeking an order for payment of the amount of R771 494.43, plus interest, and an order declaring the immovable property specially executable.

34 As Standard Bank has amply demonstrated in its supplementary²⁹ and replying³⁰ affidavits, it has, together with its collecting agents and attorneys, tried by every means available to make contact with the Defendants, and to avoid the need for litigation, notwithstanding their repeated default.

Standard Bank's efforts to engage with the Defendants

35 Between January and July 2006, Standard Bank concluded two home loans with the Defendants, in the amounts of R660 000 and R176 000, repayable over 20 years, and subject to Standard Bank's right, in the event that the Defendants failed to pay any instalment due, to claim immediate repayment of

²⁹ Standard Bank SA, Vol 2, paras 39-46, pp 91-98.

³⁰ Standard Bank RA, Vol 10, paras 31-32.10, pp 778-780.

the outstanding balance.³¹ Covering mortgage bonds were registered over the property in Standard Bank's favour.³²

36 In 2012, the account fell into arrears for the first time, and was transferred to the collections department.³³ In 2015, the account fell into arrears again, and was again transferred to the collections department.³⁴

37 During January and February 2016, after struggling to establish contact with the Defendants, the matter was transferred between external collections agent and Standard Bank's Credit Customer Assist Department ("CCA") for assistance in possibly restructuring the account.³⁵ But no contact could be made with the Defendants.

38 On 26 April 2016, when the account was four months in arrears, the matter was referred to attorneys for legal process. After proceedings were instituted, on 24 June 2016, a Mr Kum, on behalf of the Defendants, contacted Standard Bank regarding the account, and seeking to enter into payment arrangements.³⁶

39 In July 2016, a payment of R60 000.00 was made into the home loan account. This significantly decreased the arrears – though the account was still in

³¹ Standard Bank SA, para 42.1-42.3, Vol 2, p 92, read with para 9.1, p 53 and para 9.1, p 78 of Bundle A of the Colombick papers.

³² *Id.*

³³ Standard Bank SA, para 42.4, Vol 2, pp 92-3.

³⁴ Standard Bank SA, para 42.5, Vol 2, p 93.

³⁵ Standard Bank SA, para 42.6, Vol 2, p 93.

³⁶ Standard Bank SA, para 42.11-42.13, Vol 2, p 94.

arrears – and the account was accordingly moved out of legal, back to “*early stage*”.³⁷

40 The agents still struggled to establish contact with the Defendants. Once again, arrears began to accumulate on the account. The matter was transferred back to legal in August 2017.³⁸

41 As at 15 August 2017, the Defendants were in arrears in the amount of R43 115.12, and were indebted to the bank in the total amount of R771 494.43, including interest.³⁹

42 The Defendants have frequently failed to pay the monthly instalments due:

42.1 From about December 2015 to date, the Defendants have (save for the months of July, September and October 2016) not in any month paid the full monthly instalment that was due.⁴⁰

42.2 No payments were made at all by the Defendants during January 2016, February 2016, March 2016, May 2016, June 2016, May 2017, September 2017, November 2017 and December 2017.⁴¹

³⁷ Standard Bank SA, para 42.14, Vol 2, p 94.

³⁸ Standard Bank SA, para 42.15, Vol 2, p 94.

³⁹ Standard Bank SA, para 42.16, Vol 2, p 94.

⁴⁰ Standard Bank SA, para 42.27, Vol 2, p 96.

⁴¹ Standard Bank SA, para 42.27(ii), Vol 2, pp 96-7.

Institution of legal proceedings

- 43 On 21 August 2017, section 129 notices were sent informing the Defendants of their breach.⁴² The Defendants did not remedy their breach and have at no stage done so.
- 44 Summons was issued on 20 September 2017 and served on 26 September 2017.⁴³
- 45 Despite instituting proceedings, Standard Bank continued in its efforts to make contact with the Defendants. Unable to reach them, a tracer was appointed who advised that the Defendants were no longer residing in South Africa.⁴⁴
- 46 On 15 and 22 November 2017, the sheriff served the application for default judgment, together with its annexures, on the defendants by affixing a copy to the principal door. The matter was twice set down and removed from the roll because there had not been personal service.⁴⁵
- 47 On 12 December 2017, Mr Kum advised the attorneys that he was taking care of the property, lived in one of the rooms, and was renting out the remaining rooms on behalf of the Defendants. He confirmed to the attorneys that the Defendants had relocated to New Zealand.⁴⁶

⁴² Standard Bank SA, para 42.17, Vol 2, pp 94-95.

⁴³ Standard Bank RA, paras 32.1-32.2, Vol 10, p 778.

⁴⁴ Standard Bank RA, para 32.7, Vol 10, p 779; Standard Bank SA, para 42.21, Vol 2, p 95.

⁴⁵ Standard Bank RA, paras 32.4-32.5, Vol 10, p 779.

⁴⁶ Standard Bank SA, para 42.22, Vol 2, p 95.

- 48 Accordingly, on 8 February 2018, Standard Bank sought, and was granted (per Vally J) an order authorizing substituted service by affixing a copy of the documents on the principal door of the property to the extent that personal service was not possible.⁴⁷
- 49 On 10 March 2018, pursuant to the judgment of Vally J, the sheriff served a further application for default judgment, together with supporting documents, on the Defendant at the *domicilium* address by affixing a copy to the principal door, as no other service was possible.⁴⁸
- 50 This year – that is, between January 2018 and May 2018 – monthly payments of R10 000.00 were made. This was more than R1 000 short of the instalment due. Moreover, even after these payments, the amount of arrears as at 1 June 2018 was R78 142.23 – more than six months of monthly instalments.⁴⁹
- 51 The outstanding balance as at 1 June 2018 (excluding interest still to be debited for 1 June 2018) amounted to R759 271.34.⁵⁰
- 52 Further attempts made by Standard Bank to contact the Defendants were unsuccessful, until the most recent settlement proposal described above.⁵¹

⁴⁷ Standard Bank RA, para 32.8, Vol 10, p 779.

⁴⁸ Standard Bank RA, para 32.9, Vol 10, p 780.

⁴⁹ Standard Bank SA, para 42.27, Vol 2, p 97.

⁵⁰ Standard Bank SA, para 42.28, Vol 2, p 97.

⁵¹ Standard Bank SA, para 42.29, Vol 2, p 97.

An order for the full outstanding balance and an order declaring the property specially executable is warranted

53 Clearly, the Defendants are serial defaulters, who reside in New Zealand, and who appear to be receiving a rental income while evading their payment obligations to Standard Bank. The property is not their primary residence. They are not indigent, vulnerable debtors at risk of losing their home. Their section 26 right to access to adequate housing is not implicated.

54 To the extent that Standard Bank has not received the first repayment instalment by 31 July 2018, we submit that Standard Bank is entitled to an order for the full outstanding balance due by the Defendants and an order declaring the property specially executable.

A DISCRETION TO POSTPONE IMMEDIATE MONEY JUDGMENT

Courts do not have a discretion to postpone money judgments

55 The first question raised in the Practice Directive is whether, when postponing an application for an order declaring property specially executable, a court has a discretion also to postpone the money judgment, so that it is dealt with at the same time and in the same inquiry as the executability application.⁵²

56 It is a long-standing practice for creditors to claim judgments for money debts and for executability of secured property in a single action.⁵³ In respect of unsecured claims, the question of execution only arises after judgment is

⁵² Practice Directive, Vol 1, para 6(a), p 15.

⁵³ *Jaffha*, para 56.

granted. However, where specially hypothecated property is concerned, both actions are dealt with together in a single particulars of claim.

57 Standard Bank agrees that it is preferable that both the money judgment and the application to declare property specially executable are heard and decided together. However, this should not lead to the conclusion that there is a discretion to postpone the money judgment. On the contrary, the cases make clear that in the ordinary course, a secured creditor will be entitled to an executability order. According to the Constitutional Court:

“Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.”⁵⁴ (Emphasis added).

58 However, in circumstances where the court concludes that it would not be just and equitable to grant the order of special executability, and assuming that the plaintiff has made out a case for the money judgment, the court simply lacks any discretion to postpone the latter.⁵⁵ In those circumstances the Court is

⁵⁴ *Jaffha*, para 58.

⁵⁵ *FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* 2014 JDR 1207 (GJ) or [2014] ZAGPJHC 117 (“**Stand 949**”) and *Absa Bank Ltd v Njolomba, RC and Another* 2018 JDR 0372 (GJ) (“**Njolomba**”).

required to grant the money judgment and the order of special executability, and to suspend the operation of only the latter. This is so for three reasons.

59 First, the court is required to give effect to the contract between the parties.

59.1 The court does not have a general equitable discretion to refuse to grant a money judgment. The credit provider and the customer concluded a contract, the essence of which was that if the debtor failed to pay back the monies owed by way of instalments, the full amount would become due.

59.2 To refuse to grant the order would undermine the value of every commercial contract, for there would always be the risk of judicial non-enforcement.

59.3 It would also violate the foundational principle that parties should comply with contractual obligations that have been freely and voluntarily undertaken. The Constitutional Court itself has held that “[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.”⁵⁶

59.4 As the Court in *Folscher* described it:

“...the creditor’s position must first be considered in its proper context. The creditor has entered into an agreement with the debtor, that both parties concluded voluntarily, to enable the debtor to acquire the immovable property, or gain access to

⁵⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57.

*capital, against the security of the bond registered over the property.*⁵⁷

59.5 To disallow the money judgment is effectively to permit debtors to borrow money to purchase immovable property and then to defeat the legitimate claims of creditors to repayment by simply asserting a constitutional right to housing.⁵⁸ In doing so, the court, quite unjustifiably, interferes with the creditor's contractual right to accelerate the discharge of obligations.⁵⁹

60 Second, the discretion to postpone the granting of an order declaring a primary residence executable is competent because it implicates section 26 of the Constitution. The granting of a money judgment simply does not implicate the right to housing. If it did, every commercial claim sounding in money would raise a constitutional issue and could thus be postponed.

61 Third, as the SCA has held, "*a mortgagee is in the same position as other creditors.*"⁶⁰ More accurately, a mortgagee can be in *no worse position* than other creditors. It can certainly be in a preferable position; that is the very purpose of security. To permit the Court a discretion to postpone the money judgment would put the mortgagee, a secured creditor, in a worse position than if it was unsecured. Lenders cannot be in a *worse* position than the unsecured

⁵⁷ *Folscher*, para 38.

⁵⁸ *Fraser*, para 20.

⁵⁹ *Fraser*, para 37.

⁶⁰ *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA), para 16. See also *Stand 949*, para 15.

creditor by virtue of the security it holds.⁶¹ It would not only be illogical, but also damaging to the secured credit market, as it would make:

61.1 lenders less likely to enter into agreements with mortgages as security;

61.2 access to bond finance less readily available.

62 In *Gundwana*,⁶² Froneman J, writing for the Court, held that:

“The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.”

63 It could hardly be clearer. Constitutional considerations regarding the right to housing do not challenge the general principle that a judgment creditor is entitled to execute upon the assets of judgment debtors to satisfy judgement debts sounding in money. It is only where execution is sought against

⁶¹ *Stand 949*, para 16. *Njolomba*, para 13.

⁶² *Gundwana*, para 53.

immovable property, that concerns regarding section 26 arise. If constitutional considerations do not challenge the general principle that a creditor can *execute* upon assets, they certainly cannot prevent obtaining the money judgment.

64 We respectfully submit, therefore, that this Court's decision in *Zwane*⁶³ was incorrect. *Zwane* concluded that the court has a discretion to postpone applications for default judgment for accelerated capital amounts.⁶⁴

64.1 In doing so, it concluded that the earlier decision of *Lekuku*⁶⁵ "*implicitly overruled*" *Stand 949* – which had held that there is no discretion to postpone a money judgment.

64.2 However, as Fisher J explained in *Njolomba*, that is simply not so. While the provisions of the Practice Manual that survived attack in *Lekuku* were those that proposed postponement of the application for executability, *Lekuku* concerned the personal service requirements in those provisions, and not the substantive question of refusing money judgments in the absence of a danger of foreclosure at that stage of proceedings.⁶⁶

64.3 In *Zwane*, the court also reasoned, erroneously, that where the bond arrears are fully paid up, the full outstanding balance of the loan will still

⁶³ *FirstRand Bank Limited t/a First National Bank v Zwane and Two Other Cases* 2016 (6) SA 400 (GJ) ("*Zwane*").

⁶⁴ *Zwane*, para 25.

⁶⁵ *Absa Bank Limited v Lekuku* 2014 JDR 2137 (GP) ("*Lekuku*").

⁶⁶ *Njolomba*, para 44.

have been rendered immediately payable.⁶⁷ The Constitutional Court in *Nkata* has explained that that is not so; after reinstatement, the previous order granting the money judgment “*would be rendered without force and effect*”.⁶⁸

The amici curiae have failed to demonstrate the impact of the money judgment on the right to housing

65 The Socio-Economic Rights Institute (“**SERI**”) claims that the court’s discretion to postpone the money judgment arises from its duty to protect the debtor’s right of access to adequate housing. It submits that the money judgment affects the right to housing “*in that it is a step that serves to undermine the debtor’s security of tenure*”⁶⁹ and it “*weakens a mortgagor’s grip over his or her home*”.⁷⁰

66 Similarly, Legal Aid South Africa claims that “*the process of obtaining the money judgment and the order of executability is both part of the same process to eventually seek the eviction of the debtor, and requires judicial oversight*”. With reference to the affidavit of Dr Reghard Brits, they suggest that severing the two orders from each other would be “*artificial*”.⁷¹

67 With respect, neither SERI, nor Legal Aid (through Dr Brits), justify their conclusion. Orders granting a money judgment and executability do naturally

⁶⁷ *Zwane*, para 14.

⁶⁸ *Nkata v Firststrand Bank Limited* 2016 (4) SA 257 (CC) (“**Nkata CC**”) para 131. See also *Firststrand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD), para 10.

⁶⁹ SERI Affidavit, Vol 10, para 5.5, p 712.

⁷⁰ SERI Affidavit, Vol 10, para 31, p 725.

⁷¹ Legal Aid Affidavit, Vol 6, paras 26-27, p 386.

form part of the “*same process*”. But for a default on a repayment obligation, a creditor cannot obtain an order for executability. But that is not a reason for the money judgment being postponed, as it does not impact upon the right to housing.

68 The Court in *Njolomba* concluded that it was not competent to postpone the money judgment precisely because “*there is no danger of foreclosure at this stage of the proceedings*”⁷² and “*there is no reason to dictate that there be judicial oversight in relation to these matters as there is no danger of foreclosure at this stage.*”⁷³

69 In short, neither SERI nor Legal Aid have explained:

69.1 precisely how, if the money judgment is granted and the executability order postponed, the right of access to adequate housing is thereby affected at this stage;

69.2 why the necessary judicial oversight cannot be applied if or when the property is declared specially executable; or

69.3 on what basis, given the SCA authority to the contrary,⁷⁴ a mortgagee can be placed in a worse position than an unsecured creditor.

70 We pause at this point to explain that the suggestion by Legal Aid that Dr Brits can offer an “*expert*” opinion on these questions is quite inappropriate.

⁷² *Njolomba*, para 44.

⁷³ *Njolomba*, para 49.

⁷⁴ *Mkhize*, para 12.

70.1 An expert's role is "to put before a court facts that require specialist skill to ascertain them or to interpret facts adduced that are not readily susceptible to interpretation by a judge owing to that judge's absence of such specialist skill."⁷⁵

70.2 Moreover, opinion evidence must not usurp the function of the Court. The witness is "not permitted to give an opinion on the legal or general merits of the case," and "[t]he expert must not be asked or answer questions which the Court has to decide."⁷⁶

70.3 That, of course, is precisely what Dr Brits has sought to do. The interpretation of the NCA and the questions in the Practice Directive are legal questions. They are at the very core of the court's expertise and functions. It is not for an expert witness to attempt to answer them. We submit that his "evidence" should be disregarded.

71 In any event, Dr Brits' submissions take the matter no further. For example, his attempted analogy with *Jaftha*, which he cites as "authority" for the argument that the money judgment and order of executability cannot be severed is without merit.⁷⁷

71.1 He notes that the Court in *Jaftha* rejected the argument that a declaration of executability does not require judicial oversight because any subsequent eviction will be subject to such oversight. By analogy, he

⁷⁵ *Thomas v B D Sarens (Pty) Ltd* 2012 JDR 1711 (GSJ) or [2012] ZAGPJHC 161.

⁷⁶ *Holtzhausen v Roodt* 1997 (4) SA 766 (W) at 768B-C. See also *Sasol Chemical Industries v Competition Commission* 2015 (5) SA 471.

⁷⁷ Legal Aid AA, Annexure PRH1, Vol 6, para 21, p 402.

reasons that the separation between a money judgment and an order of executability is equally artificial.⁷⁸

71.2 But the analogy demonstrates precisely the opposite. While an eviction may be the moment that a debtor is forced to *leave* her home, the moment when payment under a sale in execution is made, is when the debtor *loses ownership* of her home. At this point reinstatement of the agreement becomes a legal and factual impossibility. Sales in execution thus impact on the right to housing themselves in that they are the proximate cause of the loss of ownership in a house. They also lead inexorably to eviction, in that the debtor becomes an unlawful occupier in the home she no longer owns.

71.3 The same is simply not true of a money judgment. A debtor does not lose ownership of her home when the money judgment is granted. Nor does she lose her right to reinstate the agreement. On the contrary, her right to her home remains entirely unaffected. And she remains able to reinstate the agreement, and render the money judgment of no force and effect, by paying her arrears.

72 The simple point remains unrebutted by the *amici*: section 26 is unaffected by the granting of the money judgment, and the Court thus lacks a discretion to postpone the money judgment.

⁷⁸ Legal Aid AA, Annexure PRH1, Vol 6, para 22, p 402.

The Practice Manual requires reconsideration

73 The submissions set out above are, of course, at odds with certain aspects of the recently amended paragraph 10.17 of this Court's Practice Manual, which applies when property is or appears to be the defendant's primary residence.

74 Paragraph 10.17.2 provides that:

"Where action proceedings have been instituted and the provisions of Rule 31(5) are applicable, the Registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court. The Registrar may not grant the money judgment separately, if the debt is related to a mortgage bond over an immoveable property."

75 Paragraph 10.17.3 provides for the postponement of matters in appropriate circumstances as follows:

"When arrears are low, and/or the period of non-payment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 months and that notice of set down should again be served. At the adjourned date, an affidavit should be filed, setting out what efforts the Bank has made to effect settlement and/or prevent foreclosure."

76 Thereafter, the Practice Manual contains a note, which effectively seeks to preclude the postponement of only the order declaring the property executable, as follows:

“Default judgment should not be granted for the amount and the order for execution only postponed as this will defeat the object of postponing the matter i.e. to allow the consumer to take advice and seek to make arrangements to bring the arrears up to date or purge the default. (FRB v Various Debtors 2016 (6) SA 400 (GJ) para 46 and Petersen para 7. See Ntsane. Also see Maleke and Lekuku.) The creditor should not seek and the court (not registrar) should not give any money judgment (either for the accelerated total balance or otherwise) unrelated to an order declaring the property executable; if a money judgment is given and then executed against movables, that precludes the debtor from reinstating the bond by paying the arrears: NCA s.129(4)(b).”

77 Thus, in effect, the Practice Manual requires that, where the arrears and period of non-payment are minimal, the court must postpone both the money judgment and the order declaring the property executable. The Practice Manual provides not only a discretion, but introduces a requirement to postpone (where the relevant circumstances pertain).

78 This gives rise to three distinct difficulties.

78.1 First, being premised on a concern that the bank will use the money judgment to proceed to execute against movables, and that the debtor will thereby be precluded from reinstating the credit agreement in terms of section 129(4)(b) of the NCA, the Practice Manual is based on a misinterpretation of the NCA, as we demonstrate below.

78.2 Second, it is plain that a money judgment *may* logically and practically precede an order declaring property specially executable. While Standard Bank submits that, in ordinary circumstances, both orders

should be granted together, there is no basis on which to *preclude* them being granted separately and to require the postponement of the money judgment.

78.2.1 Indeed, the provisions of Rules 46 and 46A of the Uniform Rules of Court clearly anticipate the possibility (though not the necessity) of a money judgment preceding an order of executability.⁷⁹

78.2.2 Both rules, which concern the proper approach to executability of immovable property, impliedly presume that a money judgment has already been granted under the credit agreement, before the process set out by those rules is implemented.

78.2.3 To take one example, Rule 46(1)(a)(i) provides that no writ of execution against the immovable property of any judgment debtor shall be issued unless “*a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ*”. But to proceed against movables, a creditor must already have a money judgment in its favour. The sub-rule accordingly pre-supposes that a money judgment may be obtained separately from, and prior to, an order of executability.⁸⁰

⁷⁹ See *Njolomba*, para 17.

⁸⁰ See *Njolomba*, para 17.

78.3 Third, by requiring that the money judgment is postponed, the Practice Manual appears, impermissibly, to create substantive law.

78.3.1 While the High Court has wide powers to regulate its own processes, both at common law and in terms of section 173 of the Constitution, it is not, by means of a practice manual, entitled to make or alter substantive law.⁸¹

78.3.2 As the Court held in *Njolomba*, the content of the Practice Manual “*strikes at the very heart of these commercial contracts. It is not merely a procedural regulation of process.*”⁸²

78.3.3 Put differently, the Practice Manual does not, as in *Lekuku*, deal with the mere inclusion of additional service requirements prior to execution. It provides for the denial of a right to obtain judgment in respect of a debt that has fallen due.

UNIFORMITY OF TREATMENT

79 The Practice Directive asks whether, *if the court does have such a discretion*, uniformity in the exercise of the discretion by judges should be requested.⁸³ It asks further, if so, what should that uniformity of treatment be, and whether the suggested manner in the Practice Manual is objectionable/desirable.⁸⁴

⁸¹ *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754H.

⁸² *Njolomba*, para 47.

⁸³ Practice Directive, Vol 1, para 6(b), p 15.

⁸⁴ Practice Directive, Vol 1, para 6(c), p 15.

80 These questions are, of course, premised on the court having a discretion to postpone the money judgment for the accelerated full outstanding balance. As explained above, Standard Bank's submission is that there is simply no discretion to postpone the granting of the money judgment – the only discretion relates to the postponement of the order declaring the property specially executable.

81 Accordingly, in an effort to assist the Court, we make submissions on the form of uniformity required in respect of this latter discretion – that is the circumstances in which it is appropriate to postpone or suspend the order declaring the property specially executable.

82 In the interests of certainty in the credit market, Standard Bank is of the view that a level of uniformity is necessary. At the same time, the appropriate order in each case will depend necessarily on the facts. A one-size-fits-all approach would run contrary to the constitutional imperative of judicial, fact-specific oversight in foreclosure matters.⁸⁵

83 Therefore, Standard Bank's view is that the appropriate level of uniformity is to provide, in general terms, for the approach that courts should adopt, the circumstances in which such an approach will apply, and the factors that the court will consider. We set out the content of Standard Bank's proposed approach below.

⁸⁵ *Lekuku*, para 36.

- 84 It is well-established what factors a court will consider before declaring property specially executable. In short, the “*overriding question*”⁸⁶ turns on the proportionality “*between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose*”.⁸⁷
- 85 A court will not grant an executability order where “*alarm bells warn of abuse or disproportionality*.”⁸⁸
- 86 However, if there are no such concerns, then “[*t*]here is nothing inherently unjustifiable or unconstitutional in the use of execution as a means of holding a mortgage debtor to the terms of her agreement when she falls into default, even if the property in question is her primary residence”.⁸⁹
- 87 Therefore, as the Full Court in the Western Cape has recognized, “...in the absence of unusual circumstances, or an abuse of process, execution against hypothecated property which is the home of the mortgagor is *prima facie* constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 rights”.⁹⁰

⁸⁶ *Lekuku*, para 36.

⁸⁷ *Gundwana*, para 54.

⁸⁸ *Mouton v Absa Bank Limited; Haylock v Absa Bank Limited* (Case No: 17922/2014; 24820/2015) (14 July 2017) (“*Mouton*”) para 50.3.

⁸⁹ *Mouton*, para 50.1, interpreting *Gundwana* and *Jaftha*.

⁹⁰ *Bekker*, para 17.

88 In its present form, and apart from the difficulties identified above, the criteria in the Practice Manual provide insufficient guidance as regards circumstances in which orders declaring property specially executable may be postponed. In particular:

88.1 its reference to amounts that are “*low*”, and periods of non-payment that are “*a few weeks/months*” is vague and provides little by way of practical guidance; and

88.2 it focuses only on the *quantum* of arrears, and the *period* of non-payment, ignoring other significant debtor-delinquency factors. Part of the proportionality requirement must be the *frequency of default*, quite apart from its quantum at a particular moment in time.

89 Instead, we submit that it is necessary to identify “*serial defaulters*” as a category. Quite apart from the quantum of the arrears, banks should not be prevented from obtaining an order declaring property executable, simply because the arrears are low, when the debtor has defaulted numerous times.

90 In broad terms, Standard Bank proposes that the Practice Manual should contain guidance along the following lines:

90.1 Where the property is not the debtor’s primary residence, the court should grant both the full money judgment and the order declaring the property specially executable, neither of which should be suspended. Execution against a holiday home or second house that it not usually

occupied by the debtor simply does not trigger the application of Rule 46.⁹¹

90.2 Where the property is the debtor's primary residence but the debtor is a serial defaulter (in that he or she has defaulted a total of six or more times during the agreement), or where the debtor's arrears are equivalent to more than three months of home loan repayments, the Court should grant both the full money judgment and the order declaring the property specially executable, neither of which should be suspended.

90.3 Where the property is the debtor's primary residence but the debtor is not a serial defaulter⁹² and where the debtor's arrears are equivalent to three months of home loan repayments or less, the Court should still grant the full money judgment and the order declaring the property executable. However:

90.3.1 In these circumstances, as part of its order the Court may provide that no sale in execution may take place on a date earlier than six months from the date of the order, but authorising the bank to issue a writ of execution and the sheriff to attach the property in the interim;⁹³

⁹¹ *Folscher*, para 30. *Stand 949*, para 11.

⁹² Again in the sense that he or she has defaulted less than six times during the agreement.

⁹³ See para 2 in *Williams and Williams v Standard Bank of South Africa* Unreported (Case no: 18088/2015, 3 May 2018)

90.3.2 The Court should not necessarily suspend the sale in execution in these circumstances. It should do so only as an exception, when execution would be disproportionate or would result in an abuse.

90.3.3 In the ordinary course, there is no abuse of process where a judgment creditor seeks to execute against a person's home where the property was specially hypothecated as security for such credit.⁹⁴

91 Standard Bank agrees with Absa⁹⁵ that it is the creditor that bears the duty to place all relevant information before the Court in its Rule 46A application, either filed together with or included in the default judgment application.

91.1 While in opposed proceedings, the consumer would naturally be best placed to provide this information to the Court, in default judgment proceedings, the creditor bears that obligation.

91.2 As the Full Court held in *Folscher*,⁹⁶ the creditor will be in a position:

91.2.1 to fully inform the court of the history of the creation of the debt, and the repayment thereof;

⁹⁴ *Fraser*, para 27

⁹⁵ Absa SA, para 75, Vol 3, p 176.

⁹⁶ *Folscher*, paras 42-44.

91.2.2 to comment upon the debtor's ability to effect payment of any arrears, by means other than allowing execution against his home to proceed; and

91.2.3 akin to that of an applicant in unopposed motion proceedings, duty-bound to fully disclose all facts that might influence the court in coming to a conclusion.

THE PROPER INTERPRETATION OF SECTION 129(3) AND (4) OF THE NCA

92 The next question posed by the Practice Directive is whether an immediate money judgment for the accelerated full balance qualifies as "*any other court order enforcing that agreement*" for purposes of s 129(3) and (4) of the NCA, and, if so, whether execution against movables would prohibit reinstatement or revival of the agreement.⁹⁷

93 Section 129(3) and (4) of the NCA provide as follows:

- (3) *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.*
- (4) *A credit provider may not reinstate or revive a credit agreement after-*
 - (a) *the sale of any property pursuant to-*
 - (i) *an attachment order; or*
 - (ii) *surrender of property in terms of section 127;*
 - (b) *the execution of any other court order enforcing that agreement; or*
 - (c) *the termination thereof in accordance with section 123.*

⁹⁷ Practice Directive, para 6(d), Vol 1, p 15.

94 Section 129(3) gives consumers the right to maintain a credit agreement's force by paying up the arrears and wasted costs at any time up to cancellation. As the Constitutional Court has explained,⁹⁸ whereas historically creditors could refuse late payment of home loan instalments that fell short of the full outstanding accelerated amounts, section 129(3) allows consumers facing a sale in execution of their properties to reverse the creditor's election to foreclose by paying the arrears amount, plus charges and costs

95 While the Court in *Nkata* was interpreting and applying the previous version of the provisions,⁹⁹ we submit that its reasoning applies equally to the amended provisions.

95.1 No party in these proceedings has suggested that the amendment to section 129(3) and (4) has stripped consumers of their rights to re-instate credit agreements by paying the arrear amount plus charges and costs.

95.2 Accordingly, properly interpreted, a mortgage debtor has the right to reinstate an agreement at any stage until the proceeds of a sale in execution of the mortgaged property have been received.¹⁰⁰

95.3 To reinstate the credit agreement, a consumer must bring the arrear home loan repayments up to date, and pay default charges and the reasonable costs of enforcing the agreement until that point.¹⁰¹

⁹⁸ *Nkata CC*, para 59.

⁹⁹ Section 129 was amended by the National Credit Amendment Act 19 of 2014, which came into effect on 13 March 2015.

¹⁰⁰ *Nkata CC*, para 131.

¹⁰¹ *Nkata CC*, para 124.

- 96 The question, then, is to what extent the right to reinstatement under section 129(3), as qualified by section 129(4), is negatively affected by an order granting a money judgment under a loan secured by a mortgage bond, and by subsequent execution of that money judgment against movables.
- 97 In our submission, the right to re-instatement in respect of a home loan is entirely unaffected by an order granting a money judgment, or by the subsequent execution of such a judgment against movables.
- 98 We submit that, when applied in the context of a home loan agreement, “*the execution of any other court order enforcing that agreement*” in section 129(4)(b) refers to execution against the immovable property constituting the security for the agreement itself, and not to execution against other property.
- 99 In this regard, we adopt the approach to interpretation helpfully collated in *Endumeni*:¹⁰²

“[I]nterpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of

¹⁰² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context, it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

100 Textually, section 129(4)(b) contemplates an execution directed at enforcing what was intended in a particular credit agreement. In the case of a home loan agreement (as they are loosely called) or mortgage agreement (as they are referred to in section 1 of the NCA), these are credit agreements “*secured by a pledge of immovable property*”. It is only when the execution is directed at the immovable property can it be said that the home loan agreement has been enforced.

101 This interpretation is not only textually permissible, it also better promotes the purposes of the NCA and section 129 and advances the spirit, purport and objects of the Bill of Rights.

102 In this regard, it finds support in the Constitutional Court's interpretation of the word "*execution*" in section 129(4). As the Court explained:

"There is no compelling reason why the meaning of 'execution' in section 129(4)(b) should be given the extended meaning preferred by the Bank. The extended construction would render the section unuseful. The High Court was correct that the barrier to a revival of the credit agreement applies only when proceeds from a sale in execution have been realised. Only then would the revival be of no use to either party."¹⁰³

103 In the context of a home loan agreement, it is only when a consumer's immovable property is sold that "*the revival [will] be of no use to either party.*" Until that time, the sale of lesser movable assets should not prevent the consumer from reinstating the agreement in respect of his or her home.

104 The contrary interpretation favoured by some of the *amici* is contrary to the purpose of the provisions, would undermine their purpose, would yield insensible and unbusinesslike results, and would thwart the spirit, purport and objects of the Bill of Rights. Quite simply, the interpretation proffered by some of the *amici* is inimical to the interests of the consumer.

¹⁰³ *Nkata, para 131* (emphasis added)

The purpose of the statute and the provisions

105 Section 2(1) expressly requires a purposive approach when interpreting the NCA.

106 In *Kubyana*, the Constitutional Court was careful to explain that while the NCA is directed at consumer protection, *“this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers. No. For just as the Act seeks to protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry.”*¹⁰⁴

107 An important aspect of interpreting the NCA is always, therefore, to strike the appropriate balance between the rights and obligations of credit providers and consumers. In this case, it is the banks’ interpretation of section 129(4) that is more protective of consumers, maximising their possibility of re-instating the agreement. By contrast, on the interpretation of some of the *amici*, the right of consumers to re-instate agreements is unduly narrowed in scope, and can, without any particular purpose, be easily thwarted.

The spirit, purport and objects of the Bill of Rights

108 Standard Bank’s approach also gives effect to the spirit, purport and objects of the Bill of Rights.

¹⁰⁴ *Kubyana*, para 20.

109 In terms of section 39(2) of the Constitution:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

110 This requires more than adopting an interpretation that avoids unconstitutionality. It also involves adopting the interpretation that better promotes the spirit, purport and objects of the Bill of Rights, where the provision is reasonably capable of such an interpretation.¹⁰⁵

111 The interpretation favoured by Standard Bank certainly better promotes the spirit, purport and objects of the Bill of Rights, by removing obstacles to the reinstatement of agreements by debtors that will ultimately permit them to retain their homes and make it more likely that they are able to pay their debts.

112 For these reasons, we respectfully submit that Van Linde J was incorrect in *Zwane*¹⁰⁶ in his interpretation of section 129(4)(b).

THE DESIRABILITY OF AN IMMEDIATE MONEY JUDGMENT

113 The Practice Directive asks whether money judgments are desirable, given its potential for attachment and execution of movables in the meantime, and that the judgment may potentially be set aside or declared null and void later.¹⁰⁷

¹⁰⁵ See, for example: *Stratford v Investec Bank Ltd* 2015 (3) SA 1 (CC) at para 36; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para 89.

¹⁰⁶ *Zwane*, paras 27 and 30.

114 However, with respect, this question proceeds from a mistaken premise. The judgment would not have to be “*set aside*” or “*declared null and void*”. As the Constitutional Court made clear in *Nkata*, the effect of reinstatement of an agreement is that “*the default judgment and subsequent attachment would be rendered without force and effect*”.¹⁰⁸

115 Moreover, obtaining an immediate money judgment has numerous benefits.

115.1 As Standard Bank demonstrated in its supplementary affidavit, it makes debtors more likely to bring themselves into compliance. This is to the benefit of the debtor, the bank and other consumers; the debtor keeps their home, the bank receives the money owed to it and other consumers do not face the costs of increased credit. In 2017 alone, in 30% of the cases in which Standard Bank obtained money judgments, the defendants entered into payment arrangements and the bulk complied.¹⁰⁹

115.2 Depriving Standard Bank of the money judgment mechanism would make repayment less likely, which would, in turn, make it more likely that more debtors lose their homes in sales in execution.¹¹⁰

115.3 Standard Bank has also explained that it rarely, if ever, proceeds to execute against movable property. In the rare cases in which it has, it has either ended up with a *nulla bona* return or the property attached

¹⁰⁷ Practice Directive, para 6(e), Vol 1, p 16.

¹⁰⁸ *Nkata*, para 131. See also *Firstrand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD) para 10.

¹⁰⁹ Standard Bank SA, para 86.1, Vol 2, p 116.

¹¹⁰ Standard Bank SA, para 86.2, Vol 2, p 117.

being of insignificant value and not sufficient enough to cover the arrears.¹¹¹

116 In any event, executing against movable property is surely preferable if it is a means by which the arrears can be paid and the debtor is able ultimately to keep his / her home.

116.1 As explained above, doing so has no impact on the debtor's ability to reinstate the agreement under section 129(4)(b) of the NCA and as a matter of principle and logic, there is simply no reason to prevent a creditor seeking payment to execute against valuable shares, vehicles or cash reserves.

116.2 Moreover, we note that the *amici* do not adopt a consistent approach on this question.

116.3 For example, Lungelo Lethu Human Rights Foundation says that its clients have "*mixed views*" as to the hardship that the sale of movable property, but that the predominant views are that:¹¹²

116.3.1 if the sale of movable property would repay the arrears it is "*preferable to the sale of the house*";¹¹³ and

116.3.2 sale of movable property which is a tool of trade should be avoided at all costs.¹¹⁴

¹¹¹ Standard Bank SA, para 86.3, Vol 2, p 117.

¹¹² LLHRF Affidavit, Vol 6 para 35, p 433.

¹¹³ LLHRF Affidavit, Vol 6 para 35.1, p 433.

¹¹⁴ LLHRF Affidavit, Vol 6 para 35.2, p 434.

116.4 The proposal that certain specified movables should be excluded is not an issue that can be dealt with in a Practice Directive. It is a matter for the legislature.¹¹⁵ The right to housing, in any event, is not implicated by the sale of such movable property.

THE SETTING OF A RESERVE PRICE

117 Lastly, the Practice Directive provides that the Full Court should consider under what circumstances a court should set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.¹¹⁶

118 The amendments made by the Rules Board last year now empower the courts to impose a reserve price where a creditor seeks to execute against the residential immovable property of a judgment debtor.

119 However, the amendments sensibly do not require that a reserve price is always imposed in such circumstances. Rather, they confer a discretion on the court regarding whether to do so in the case concerned.

120 In accordance with the Rules Board's approach, Standard Bank does not seek to suggest that courts should never or should not generally impose a reserve price. Its submission is considerably more modest.

¹¹⁵ See, for example, section 67 of the Magistrates' Courts Act 32 of 1944 which provides for seven categories of movable property which are generally exempt from execution.

One of these, dealt with in section 67(e), is "*tools and implements of trade, in so far as they do not exceed in value the amount determined by the Minister from time to time by notice in the Gazette*".

¹¹⁶ Practice Directive, para 7, Vol 1, p 16.

121 Standard Bank merely seeks to emphasise that a court exercising its powers under Rule 46A should not unreflectively set a reserve price in all or most cases, nor should it assume that the setting of a reserve price will necessarily improve the price obtained. Rather, a more nuanced understanding of the effects of a reserve price is necessary for a court properly to exercise its discretion on a case-by-case basis.

122 In this regard, Standard Bank has explained why the setting of a reserve price can sometimes have unintended and harmful effects, why it will not always assist in obtaining a price closer to market value,¹¹⁷ and why it should therefore not be a default position.¹¹⁸

123 As Standard Bank explained in its supplementary affidavit,¹¹⁹ while Rule 46A sets out an open list of factors to consider, there are various relevant considerations not expressly mentioned, which include:

123.1 the condition of the property at the point of sale;

123.2 supply and demand in the particular area; and

123.3 geotechnical reasons such as a property lying on a flood line or being located close to an electric pylon.

¹¹⁷ See also *Nkwane v Nkwane and others* [2018] ZAGPPHC 153, para 14.

¹¹⁸ Standard Bank SA, paras 87 - 97, Vol 2, pp 118 - 121.

¹¹⁹ Standard Bank SA, para 95, Vol 2, pp 120-121.

124 Importantly, Rule 46A recognises that the factors that it lists not only determine the amount at which the reserve price should be set, but “*whether to set a reserve price*” at all.

125 In sum, Standard Bank submits that:

125.1 The question *whether* to impose a reserve price at all is one that courts should take seriously in each case. There will be cases where the setting of a reserve price will be inappropriate, and will negatively affect the prospects of achieving a sale.

125.2 The imposition of reserve prices should thus not be a default or automatic position. The discretion conferred by Rule 46A regarding whether to set a reserve price must be carefully exercised on the facts of each case concerned.

125.3 Standard Bank accepts that it is incumbent on the applicant bank to provide the court, in its default judgment application, with a proposed reserve price figure, or a proposal that, on the facts of the case, no reserve price should be set.

125.4 Where the court *is* of the view that a reserve price would be appropriate, Standard Bank submits that it should be determined with reference to a forced sale value and at the same time as the order granting the money judgment and declaring the property executable (subject to a suspension period, when appropriate).

126 With respect, the contrary submissions of the LLHRF are not sustainable.

126.1 For example, the core premise of Dr Muller's expert affidavit is that there is a misalignment of incentives between banks and debtors to achieve a sale price in excess of the outstanding debt. In other words, he suggests that a reserve price is necessary because the bank has no interest in achieving a sale price in excess of what it is owed by the debtor.¹²⁰

126.2 Dr Muller acknowledges, however, that the bank and the debtor have aligned incentives to achieve a sale price that is at least equal to the outstanding debt. If the bank fails to do so, then it loses the opportunity to obtain the money owed to it through the sale.¹²¹

126.3 This has indeed been recognised by the High Court in *Baretzky*, where Binns-Ward J held that “[s]ave in a case in which some improper collusion or ulterior purpose is engaged, the execution creditor will have a corresponding interest with the judgment debtor in realising the property for an amount that will at least cover the judgment debt”.¹²² Indeed, the Court in *Mouton* went further, recognising that “[i]t is in the interests of both the bank and the judgment debtor to realise as much value in the property as reasonably possible.”¹²³

126.4 Most importantly, as Standard Bank explained in its replying affidavit, Dr Muller's theory has no grounding in fact.

¹²⁰ Dr Sean Muller Expert Affidavit, paras 6.1, 8-11, Vol 9, pp 633 and 635-636.

¹²¹ Dr Sean Muller Expert Affidavit, para 10, Vol 9, pp 635-636.

¹²² *Baretzky*, para 13.

¹²³ *Mouton*, para 86.

126.4.1 Most sales in executions do not achieve the outstanding debt. In 2017, sales in execution achieved on average only approximately 51% of total outstanding debt.¹²⁴ Quite clearly, in the majority of cases, something other than the bank's incentives are driving down the prices in sales in execution. This emanates, most significantly, from the unavoidable fact of it being a forced sale.

126.4.2 At the same time, there are instances of values being achieved which exceed the outstanding amount due to Standard Bank. Two randomly selected months from 2017 make this clear. In April 2017, Standard Bank sold 74 properties in execution and, of these, 10 were sold for more than 100% of the outstanding debt (with an average recovery rate of approximately 165% of the outstanding debt), and the customer then received the benefit of the surplus.¹²⁵ The experience in September 2017 was very similar.¹²⁶

127 Lastly, LLHRF proposes the appointment of an expert panel to determine the reserve price issues.¹²⁷ Standard Bank is opposed to such an approach.

127.1 The Court would quite inappropriately be playing the role of the Rules Board. Courts should deal with the issue on a case-by-case basis in

¹²⁴ Standard Bank RA, para 27.1, Vol 10, p 775.

¹²⁵ Standard Bank RA, para 27.2.1, Vol 10, p 775.

¹²⁶ Standard Bank RA, para 27.2.2, Vol 10, p 776.

¹²⁷ LLHRF AA, para 13, Vol 6, pp 422-423.

deciding whether to impose a reserve price and, if so, in what amount.

127.2 The further development of the proper approach can be determined in the context of particular cases, and will be clarified further in future should the need arise.

127.3 Moreover, adopting this approach would lead to a further and unjustified delay in the resolution of foreclosure matters.

CONCLUSION

128 In the circumstances, we submit that:

128.1 the issues raised in the Practice Directive should be determined in accordance with the responses set out above; and

128.2 in respect of the *Colombick* matter:

128.2.1 if Standard Bank receives the agreed payment by 31 July 2018, it will not proceed with its application for default judgment;

128.2.2 if Standard Bank does not receive the agreed payment by 31 July 2018, the Court should grant an order for payment of the amount of R771 494.43, plus interest, and an order declaring the immovable property specially executable.

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20 July 2018

LIST OF AUTHORITIES

Absa Bank Limited v Lekuku 2014 JDR 2137 (GP)

Absa Bank Ltd v Njolomba, RC and Another 2018 JDR 0372 (GJ)

Baretzky and Another v Standard Bank of South Africa Limited and Others [2017] ZAWCHC 9 (16 February 2017)

Barkhuizen v Napier 2007 (5) SA 323 (CC)

FirstRand Bank Ltd v Folscher and Another and Similar Matters 2011 (4) SA 314 (GNP)

FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another 2014 JDR 1207 (GJ) or [2014] ZAGPJHC 117

FirstRand Bank Ltd v Mdletye and Another 2016 (5) SA 550 (KZD)

FirstRand Bank Limited t/a First National Bank v Zwane and Two Other Cases 2016 (6) SA 400 (GJ)

Gundwana v Steko Developments and Others 2011 (3) SA 608 (CC)

Holtzhausen v Roodt 1997 (4) SA 766 (W)

Jaftha v Schoeman and Others; Van Rooyen v Scholtz and Others 2005 (2) SA 140 (CC)

Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC)

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

Mkhize v Umvoti Municipality and Others 2012 (1) SA 1 (SCA)

Mouton v Absa Bank Limited; Haylock v Absa Bank Limited (Case No: 17922/2014; 24820/2015) (14 July 2017)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

Nedbank Ltd v Fraser and Another and Four Other Cases 2011 (4) SA 363 (GSJ)

Nedbank Limited v Mortinson 2005 (6) SA 462 (W) or [2006] 2 All SA 506 (W)

Nkata v FirstRand Bank Limited 2016 (4) SA 257 (CC)

Nkwane v Nkwane and others [2018] ZAGPPHC 153

Sasol Chemical Industries v Competition Commission 2015 (5) SA 471

Sebola and Another v Standard Bank Ltd and Another 2012 (5) SA 142 (CC)

Standard Bank of South Africa Ltd v Bekker and Another 2011 (6) SA 111 (WCC)

Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264 (SCA)
or [2006] 2 All SA 382 (SCA)

Stratford v Investec Bank Ltd 2015 (3) SA 1 (CC)

Thomas v B D Sarens (Pty) Ltd 2012 JDR 1711 (GSJ) or [2012] ZAGPJHC 161

Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A)

Williams and Williams v Standard Bank of South Africa Unreported (Case no: 18088/2015, 3 May 2018)