

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

Case No: 2018/612

In the matters between:

ABSA BANK LIMITED

Plaintiff

and

D K MOKEBE

Defendant

Case No. 2017/48091

ABSA BANK LIMITED

Plaintiff

and

R L KOBE

Defendant

Case No. 2018/1459

ABSA BANK LIMITED

Plaintiff

and

M N VOKWANA

Defendant

Case No. 2017/35579

STANDARD BANK OF SOUTH AFRICA

Plaintiff

and

ILLAN SAMSON COLOMBRICK

First Defendant

PAMELA ELVINE KIMBERG

Second Defendant

and

INVESTEC BANK LIMITED

First Amicus Curiae

NATIONAL CREDIT REGULATOR

Second Amicus Curiae

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SA

Third Amicus Curiae

LEGAL AID SA

Fourth *Amicus Curiae*

LAW SOCIETY OF SA

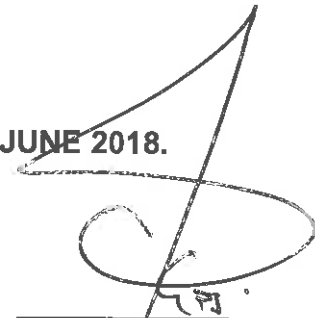
Fifth *Amicus Curiae*

FILLING SHEET OF THE THIRD AMICUS CURIAE – HEADS OF ARGUMENTS

Presented for service

1. Third amicus curiae – heads of arguments

DATED AND SIGNED AT JOHANNESBURG ON THE 28 JUNE 2018.



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**HEADS OF ARGUMENT ON BEHALF OF
THE SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA (“SERI”)**

A INTRODUCTION

- 1 There is one fundamental question underlying the issues referred to the Full Court in these matters. That question is how to arrange the foreclosure process in order to preserve the right to reinstate an agreement in terms of section 129 (3) of the National Credit Act 34 of 2005 (“the NCA”); to give distressed consumers¹ the greatest possible opportunity to meet their obligations under the mortgage loan agreement; and to maximise the chance that consumers will be able to maintain ownership of their homes.
- 2 ABSA and Standard Bank (“the banks”), accept that these are the proper objectives of the foreclosure process.
- 3 The banks also emphasise, and SERI agrees, that there must be a point where the consumers who have no realistic prospect of bringing their accounts up-to-date face enforcement of the mortgage loan agreement and execution against their homes.

¹ In the sense defined in part (d) of the definition of “consumer” in section 1 of the NCA.

- 4 However, that point is not always the first time the foreclosure application comes before court. The banks say that they take a great deal of care in the credit agreement enforcement process. But such is the overwhelming power of the banks, the volume of credit agreements that they administer, and the complexity of the process, that mistakes are inevitable.
- 5 The case law is littered with such mistakes. Houses have been sold after important notices are sent to the wrong address.² Mortgage loans have been called up for as little as R18.46 in arrears.³ ABSA points out that the average time taken to execute against a consumer's property is over two years.⁴ But averages can be deceptive. In *Zwane*, the home loans were called up after the accumulation of as little as three months' worth of arrears.⁵
- 6 None of this is to suggest that the banks act in bad faith. But the reality is that they are large institutions exercising state-like powers in terms of standard form loan agreements. Mistakes are bound to be made. Banking officials, and their legal representatives, are bound to take decisions that they should not take. The courts are required to exercise oversight to ensure that a consumer is not unfairly deprived of a home as a result.⁶

² *Sebola v Standard Bank* 2012 (5) SA 142 (CC), para 5.

³ *Absa Bank v Ntsane* 2007 (3) SA 554 (T), paras 12 to 17.

⁴ Record, vol 3, p 154, para 33.

⁵ *Firstrand Bank v Zwane* 2016 (6) SA 400 (GJ), para 3.

⁶ *Gundwana v Steko Development* 2011 (3) SA 608 (CC), para 41.

- 7 It is for these reasons that section 26 of the Constitution, section 130 (3) of the NCA, this Court's practice directive concerning foreclosure, and the extensive jurisprudence that has developed dealing with all of these instruments, presume that a court may not rubber stamp foreclosure applications at the first opportunity. A foreclosure order may only be made once a court is satisfied that the provisions of the NCA have been complied with, and that execution is a proportionate measure to collect the debt owing on the mortgage loan agreement.
- 8 A court will often postpone foreclosure proceedings in order to give the consumer a chance "to take advice and seek to make arrangements to bring the arrears up to date or purge the default".⁷ Indeed, section 130 (3) requires a court to do so if it is not "satisfied" that the procedures prescribed by sections 127, 129 and 130 have been complied with.
- 9 SERI submits that, when viewed within the broader framework and purposes of the constitutional and statutory principles that have developed to regulate the foreclosure process, it makes no sense that the court's power to postpone a foreclosure application is limited to the prayer for special execution against the consumer's home. A court must have a discretion to postpone the application for the money judgment as well,

⁷ Gauteng Local Division, Foreclosure (and Execution when Property is, or appears to be, the defendant's primary home) Practice Directive ("Practice Directive on Foreclosures"), para 4.

precisely because not doing so may defeat the purpose of the postponement.

- 10 A consumer's default on the mortgage loan agreement and the power to execute against the property on which it is secured ought to be dealt with, where possible, together, in one, final, hearing, so that the bank and the consumer know where they stand. The kind of limping enforcement that that the banks appear to advocate – first grant the money judgment, then grant leave to execute, and then set either or both aside if the mortgage loan agreement is reinstated or another arrangement is reached between the bank and the consumer – does nothing for the proper administration of justice, or the transparency of the foreclosure process. It is also likely to increase the costs of enforcement proceedings for both the consumer and the banks.
- 11 SERI therefore submits that, if it is possible to interpret the constitutional and statutory provisions governing the foreclosure process in a manner that permits a court to postpone the money judgment for determination with the application for special execution, then that is what should be done.
- 12 Such an interpretation is clearly possible. Section 26 of the Constitution empowers a court to postpone an application for a money judgment where granting the judgment would undermine the consumer's tenure and postponing the application might allow the consumer to take steps to secure it again. A court's power to protect and regulate its own process

extends to the postponement of the application for a money judgment if the court thinks that a consumer may yet be able to reinstate the credit agreement, or secure help from a debt counsellor or other dispute resolution mechanism.

- 13 The banks assert that the acknowledgement of a power to postpone the granting of the money judgment would create a substantive rule of law, but that is plainly not so. What is envisaged is the discretionary power to delay the granting of a money judgment, not an absolute rule that suspends the enforcement of an agreement.
- 14 To hold that a money judgment must be granted at the point that it is first applied for also risks curtailing the right of reinstatement provided for in section 129 (3) of the NCA. The text of section 129 (4) precludes reinstatement of a credit agreement once a money judgment has been obtained and executed, even if leave to execute against the consumer's home has not yet been granted. The banks' creative interpretations to the contrary have insufficient regard to the text of section 129 (4).
- 15 The principles of fairness in the foreclosure process outlined above extend through to the structuring of the execution process itself. For that reason Rule 46A now provides for a court to set a reserve price in appropriate cases, so as to protect the value stored in a home that is to be subject to execution. Properly exercised, this power will preserve the security value of a home, in the interests of both the banks and the consumer.

16 SERI accordingly makes the following three submissions, in response to the questions referred to the Full Court.

16.1 First, this Court has a discretion to refuse a money judgment, even when the creditor has established a contractual right to it. It is now trite that where the exercise of a contractual power would affect a constitutional right, a court may decline to enforce the contract. This is spelt out in decisions of the Constitutional Court in both *Jaftha*⁸ and *Barkhuizen*.⁹ A court could, in a proper case, decline to enforce a contract altogether. But what is contended for in this case is simply the delay of the enforcement of the right to a money judgment until it is clear that there is no other way of enforcing the credit agreement, and that execution of the money judgment against a debtor's home would be proportional. Such a power is, in any event, well within the scope of this Court's power to protect and regulate its own process.

16.2 Second, sections 129 (3) and (4) of the NCA preclude a mortgagor from reinstating a mortgage loan agreement once the proceeds of execution of a money judgment granted on that agreement have been realised. Accordingly, granting a money judgment on that agreement enables the credit provider to preclude reinstatement by attaching and selling the mortgagor's

⁸ *Jaftha v Schoeman* 2005 (2) SA 140 (CC).

⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

moveables. The interpretations to the contrary advanced by the banks are unduly strained, and ignore key features of the text of section 129 (4) of the NCA.

16.3 Third, the setting of a reserve price in a sale-in-execution of a person's home should be the norm, and the burden of justifying departures from it should lie with the banks. The point of departure for the reserve amount should be the fair market value of the property. The onus of showing that this amount should be discounted in a particular case ought to fall on the execution creditor.

17 These submissions are developed below.

B DISCRETION TO REFUSE MONEY JUDGMENTS

18 Courts have the power to frustrate the exercise of contractual rights, even where these rights are valid and lawful on their face. The question will always be whether a contractual term "should be enforced in the light of the circumstances" in which enforcement is sought.¹⁰

19 It is accordingly clear that it is not just the text of a contract that is subject to constitutional control. The implementation of a contractual right may be

¹⁰ *Barkhuizen*, para 56.

disallowed its implementation is contrary to constitutionally-informed public policy in the circumstances of a particular case.

20 Similarly, executing a debt in a manner that deprives a person of ownership of his home will always entail an infringement of section 26 of the Constitution. The question is whether, in the particular circumstances, the infringement is justified.

21 A mortgage loan agreement provides a mortgagee with extraordinary advantages as a creditor. It permits the mortgagee to accelerate the debt in the event that a single instalment is left unpaid, and permits the mortgagee to forgo execution against the mortgagor's movables and execute directly against the mortgaged property. These two powers are inextricably linked: "[t]he right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself".¹¹

22 It is wholly artificial to suggest, as the banks do, that the power to accelerate the debt can be treated as separate to and independent of, the power to sell the mortgaged property. It is fanciful to suggest that granting a money judgment for the full accelerated debt does not have any impact on the right to housing or the tenure of the mortgagor.

¹¹ *Standard Bank v Saunderson* 2006 (2) SA 264 (SCA), para 2.

- 23 As is illustrated below, the granting of a money judgment for the full accelerated debt due on mortgage loan agreement places the bank in possession of the power to preclude the reinstatement of the mortgage loan agreement.
- 24 However, it also creates, from the consumer's perspective, a mountain that many will assume simply cannot be climbed. The banks draw a wholly technical distinction between the right to the money judgment, the right to reinstate and the right to execute against the mortgaged property. But these niceties will not present themselves to a distressed consumer.
- 25 The granting of a money judgment places the consumer under immediate compulsion to pay a debt that everyone will have accepted, at that point, that he or she simply cannot pay. This obviously has the effect of weakening the consumer's grip over the property.
- 26 The primary enquiry at the point of execution is whether the arrears outstanding on the mortgage loan agreement might yet be brought up to date,¹² thereby securing the consumer's ownership of the property. If there is a reasonable possibility that the arrears might yet be brought up to date, then there is no purpose in granting the money judgment. If there is no reasonable likelihood that the arrears might be brought up to date, then, except perhaps in the most extreme of cases, there is no reason not to

¹² *Saunderson*, para 20. Practice Directive on Foreclosures, para 4.

grant both a money judgment and an order authorising execution against the consumer's home.

- 27 The question of whether execution is proportionate is inextricably linked to the question of whether the money judgment should be granted. This makes money judgments in foreclosure applications different from all other money judgments.
- 28 To separate the money judgment from the order authorising execution serves no useful purpose, other than to saddle consumers with debts they know they cannot pay.
- 29 There are accordingly strong constitutionally-informed public policy reasons for permitting a court the discretion to postpone the application for the money judgment for determination with the application for leave to execute against the mortgaged property.
- 30 Even if this were not so, a court clearly has the power, in protecting and regulating its own process, to delay the granting of the money judgment where it would be convenient to do so. Recognising this power does not create a substantive rule of law. It would only do so if the courts arrogated to themselves a power to indefinitely suspend the granting of the money judgment, or the power to refuse it altogether. But that is not what is proposed. What is suggested is that the court will postpone the money judgment to be dealt with together with the application for leave to execute against the mortgaged property. Nothing more.

31 ABSA accepts that, ideally, the money judgment and the attachment order should be granted simultaneously.¹³ But neither of the banks advances any acceptable reason why this should not lead to the conclusion that the money judgment ought to be delayed until the attachment order can finally be granted. They offer no real evidence for the suggestion that granting the money judgment first somehow coaxes the consumer into bringing his account up-to-date, as opposed to placing him into a situation of hopelessness.

32 Accordingly, courts clearly have the power to decline to enforce payment obligations under contracts, including mortgage loan agreements, on public policy and constitutional grounds. In foreclosure applications concerning a consumer's home, they generally should do so until it is clear that execution against a mortgagor's home cannot be avoided.

C THE MEANING OF SECTIONS 129 (3) AND (4) OF THE NCA

33 Sections 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-

¹³ Record, vol 3, p 173, para 67.

- (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.

34 The sale of mortgaged property is a sale “pursuant to an attachment order” for the purposes of section 129 (4) (a) (i) of the NCA. The “attachment order” is the order declaring the mortgaged property specially executable. A money judgment is accordingly “any other” court order enforcing an agreement for the purposes of section 129 (4) (b).

35 In *Nkata*¹⁴ the majority of the Constitutional Court held that sections 129 (3) and (4) enable a consumer to stave off execution against his property by purging his arrears and paying the credit provider’s default charges and the reasonable costs of enforcing the agreement. This can be done right up until the point that proceeds of a sale-in-execution of the mortgaged property are realised, but not thereafter.¹⁵

36 The Constitutional Court did not finally decide which provision of the NCA limits the right of reinstatement. The gist of the majority’s decision was that whether the mortgaged property was “attached” within the meaning of section 129 (4) (a) (i), or was executed against in terms of an order under section 129 (4) (b) of the NCA, the result was the same. The Court held

¹⁴ *Nkata v Firstrand Bank* 2016 (4) SA 257 (CC).

¹⁵ *Nkata*, para 131.

that if there had been “an attachment of the bonded property”, then the sale pursuant to the attachment order happened after Ms. Nkata reinstated her agreement.¹⁶ If the question was whether an order was “executed” within the meaning of section 129 (4) (b), then the execution took place once the proceeds of the sale had been realised. That too, was well after Ms. Nkata reinstated her agreement.¹⁷

37 The High Court in *Nkata* found that a sale-in-execution of mortgaged property was not a sale “pursuant to an attachment order” because the NCA tends to use the term “attachment order” to refer only to agreements that deal with moveable property. The problem with this interpretation is that section 129 (4) (a) refers to the sale of “any property” pursuant to an attachment order, not just the sale of moveables. If, as seems obvious, immovable property is capable of being subjected to attachment by court order, the natural meaning of section 129 (4) (a) includes immovable property.

38 In *Njolomba*,¹⁸ this Court adopted a radical interpretation of section 129 (4). The Court reasoned that 129 (4) is not intended to apply to immovable property at all, and only deals with moveables.¹⁹ The untenable consequence of this conclusion is that section 129 (4) does not limit the reinstatement of a mortgage loan agreements at all. For that reason, the

¹⁶ *Nkata*, para 136.

¹⁷ *Nkata*, para 131.

¹⁸ *Absa Bank Limited v Njolomba and 7 similar cases* [2018] ZALCJHB 122 (5 March 2018).

¹⁹ *Njolomba*, para 25.

conclusion in *Njolomba* must be rejected. It is, at the very least, incompatible with the decision of the Constitutional Court in *Nkata*.

39 It is submitted that the natural reading of section 129 (4) is that a sale in execution of mortgaged property is a sale “pursuant to an attachment order” for the purposes of section 129 (4) (a) (i) of the NCA. A money judgment granted on the acceleration of a mortgage loan agreement is “any other court order” enforcing a mortgage loan agreement.

40 The consequence of this is that granting a money judgment for the accelerated debt due on a mortgage bond agreement will always enable a bank to preclude the reinstatement of a mortgage loan agreement by executing against the debtor’s moveables. Once the proceeds of that execution are realised, the bank will have executed a court order enforcing the mortgage loan agreement, and reinstatement will have been precluded.

The banks’ interpretations of section 129 (4)

41 The banks’ interpretations of section 129 (4) both proceed on the basis that mortgaged property cannot be the subject of an “attachment order” within the meaning of section 129 (4) (a) (i). But there is no reason to suppose that this is so. The High Court’s conclusion in *Nkata* – that an “attachment order” only referred to the attachment of moveables – was not endorsed by the Constitutional Court. The majority of the Constitutional

Court assumed that mortgaged property might be subject to an “attachment order”.²⁰ The minority explicitly left the question open.²¹

42 The Constitutional Court has long accepted that the ordinary meaning of the word “attachment” includes the attachment of immovable property.²² Indeed, section 129 (4) (a) refers to “any property”, not just to moveable property. The interpretation of section 129 (4) (a) wrought by the High Court in *Nkata*, and adopted by ABSA and Standard Bank, is unduly strained, and fails to make sense of the words actually used in section 129 (4).

43 The interpretive arguments based on section 39 (2) of the Constitution advanced by ABSA and Standard Bank cannot override the plain text of the section, or justify a construction of the section that is unnatural or strained.²³ The starting point of interpretation is to attribute meaning to “the words used in a document”.²⁴ If the words used cannot serve the purposes that the interpreter wishes them to serve, then those purposes are inadmissible to interpret the words.

44 Even assuming the banks are right, and that the text of section 129 (4) (b) refers to any order enforcing a credit agreement other than an attachment

²⁰ *Nkata*, para 136.

²¹ *Nkata*, para 71.

²² *Gundwana* para 5; *Jaftha*, para 65; *Sebola* para 31.

²³ *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC), para 88; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), para 23.

²⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

order dealing with moveable property, it nonetheless strains the meaning of section 129 (4) (b) to suggest that the words “any other court order enforcing that agreement” refers only to the order granting leave to execute, and not to the money judgment. The clear intention is to refer to “any” court order that is obtained and executed in the enforcement of the agreement, not just to court orders that have the effect of depriving the consumer of the property against which the debt is secured.

45 In any event, it only becomes necessary to adopt the banks’ interpretation of section 129 (4) if it is concluded that there is no discretion to postpone the application for the money judgment to be dealt with together with the application for leave to execute against the mortgaged property. For the reasons set out above, there is such a discretion.

46 Accordingly, there is no reason for this court to adopt such a strained interpretation of section 129 (4). In the ordinary course, the money judgment and the order granting leave to execute against the mortgaged property should be granted at the same time. As ABSA acknowledges, there will then be no point in executing on the money judgment.²⁵ If the banks wish to execute at that point, they will do so against the mortgaged property.

²⁵ Record, vol 3, p 174, para 71.1.

D THE RESERVE PRICE

47 The old Rule 46 (12) provided that a sale in execution “shall be without reserve” save in the circumstances set out in Rule 46 (5).

48 The new Rule 46A (9) provides that in any application under Rule 46A, a court must consider whether to set a reserve price and the amount at which the reserve price should be set. In doing so, the court must take into account eight mandatory factors and “any other factor that in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor”.

49 The court is accordingly vested with a new power. SERI submits that it would be unwise, at this stage, to prescribe too closely what considerations would dissuade a court from setting a reserve price and how the various factors in determining the reserve price should interact.

50 However, the purpose of the new rule is clear. It is to prevent homes from being sold for trifling amounts and to protect, insofar as is possible, the mortgaged property as a store of value for both the banks and the consumer. For the consumer, the primary purpose of obtaining a mortgage bond is to provide a “nest-egg”: to allow the accumulation of capital in the property.²⁶ The setting of a reserve price protects, insofar as this is possible in the circumstances, the value of that investment.

²⁶ *Firstrand Bank v Folscher* 2011 (4) SA 314 (GNP), para 39. See also Uniform Rule 16A (9) (b) (iv).

- 51 On that basis, SERI submits that the point of departure should always be that –
- 51.1 a reserve price should be set; and
- 51.2 the starting point in determining the reserve price should be the market value of the property. Any factor that might lower the reserve price should then be discounted from the market value of the property.
- 52 SERI does not suggest that there can never be deviations from these requirements. But, in the absence of sound reasons to the contrary, a court should do what it can to preserve the investment in the property made by the consumer, and the value of the property as the banks' security.
- 53 It has long been recognised in other contexts that market value ought to be the starting point for a judicial determination of the price of immovable property. In *Du Toit*²⁷ the Constitutional Court held, in the context of expropriation, that “the market value of the expropriated property could become the starting point” in evaluating just and equitable compensation for the purposes of expropriation. Although this approach “may not be suitable in all cases” it is “the most practicable one” in the circumstances of that case.²⁸

²⁷ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

²⁸ *Du Toit* para 37.

54 SERI submits that there is no reason to think that the determination of a reserve price would be any different. In the case of expropriation, the aim is to ensure that the expropriated owner is given fair compensation having regard to a test with multiple factors set out in section 25 (3) of the Constitution, one of which is the market value of the property. Many of the other factors – for example the historical investment by the state in the property, or the purpose of the expropriation – might result in a discount from the market value of the property. However, market value is the most convenient starting point, because it is objectively ascertainable, and is the best guide to the actual current price of the land.

55 The multi-factor test in Rule 46A (9) has a similar structure to section 25 (3) of the Constitution. The first factor to be taken into account is the market value of the property, which is capable of objective determination. Most of the other factors listed in subrule (9) would probably function as discounts from that value. For example, if the property is currently occupied by person who have nowhere else to go, that might significantly reduce the value of the property in terms of subrule 46A (9) (vi).

56 The fundamental point is that starting with market value, and moving from there, is both a convenient way to do the calculation, and has appropriate regard to the mortgaged property as a store of value.

E CONCLUSION

57 For all of these reasons, SERI submits that –

57.1 A court has a discretion to postpone the granting of a money judgment until a bank's entitlement to execute against the mortgaged property is finally determined.

57.2 Section 129 (3) of the National Credit Act precludes the reinstatement of a mortgage loan agreement once the proceeds of executing a money judgment enforcing the agreement have been realised.

57.3 Unless there are strong reasons not to do so in a particular case, a court should always set a reserve price in terms of Rule 46A (9). The starting point should always be the market value of the property, which may then be discounted from if the other factors listed in Rules 46A (9) warrant such a discount.

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Chambers, Sandton, 27 July 2018

LIST OF AUTHORITIES

Statutes

National Credit Act 34 of 2005.

Rules of Court and Practice Directives

Uniform Rule 46A

Gauteng Local Division, Foreclosure (and Execution when Property is, or appears to be, the defendant's primary home), Practice Directive.

Cases

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Absa Bank Limited v Njolomba and 7 similar cases [2018] ZALCJHB 122 (5 March 2018).

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