



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 5 November 2021

Case No: 11111 / 2020

In the matter between:

ANOOSHKUMAR ROOPLAL NO

Applicant

and

NDIVHUWO KHANGELA

First Respondent

AZWINDINI CONSTANCE KHANGELA

Second Respondent

JUDGMENT

WILSON AJ:

- 1 The applicant, Mr. Rooplal, is the liquidator of VBS Bank. In 2017, VBS entered into two credit agreements with the first and second respondents, Mr. and Mrs. Khangela. The first agreement, a motor vehicle credit agreement, financed the purchase of a Mercedes Benz. The second agreement, a

mortgage credit agreement, financed the purchase of Mr. and Mrs. Khangela's home.

- 2 VBS went into liquidation in 2018. Apparently because Mr. Khangela's income was derived from a contract he had with VBS at the time, and which Mr. Rooplal cancelled on VBS' liquidation, Mr. and Mrs. Khangela fell into arrears on their repayments due under both the credit agreements.
- 3 In this application, Mr. Rooplal seeks the return of the motor vehicle, and judgment for the amount outstanding on the motor vehicle credit agreement, less the market value of the Mercedes at the point of its return. Mr. Rooplal also seeks judgment for the full accelerated amount due on the mortgage credit agreement.
- 4 My sister Robinson AJ granted the relief sought in relation to the motor vehicle credit agreement on 28 April 2021. She postponed the application for the money judgment on the mortgage credit agreement *sine die*, in order to allow Mr. Rooplal to comply properly with section 129 (1) of the National Credit Act 34 of 2005 ("the Act"). Robinson AJ's judgment is reported as *Rooplal N.O. v Khangela* [2021] ZAGPJHC 516 (28 April 2021).
- 5 Mr. Rooplal re-enrolled the application for a money judgment on the mortgage credit agreement before me on 28 October 2021.
- 6 The general rule, established in *Absa Bank v Mokebe* 2018 (6) SA 492 (GJ) ("*Mokebe*"), is that, where the mortgaged property is a home, Judges of this Division will not entertain and determine an application for a money judgment on a mortgage credit agreement separately from the application to execute

against the mortgaged property. The money judgment forms part of the cause of action for the application for leave to execute. Whether or not the money judgment should be granted is inextricably bound up with the question of whether execution against the mortgaged property is proportionate, within the meaning of the decisions of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) and in *Gundwana v Steko Development* CC 2011 (3) SA 608 (CC).

- 7 I do not read this Court's decision in *Mokebe* as establishing an absolute rule that an application for a money judgment on a debt secured against residential property can never be determined separately from the application for leave to execute against the mortgaged property. However, the effect of *Mokebe* is that there should be circumstances that favour making an exception to the general rule that the money judgment relief and the special execution relief should be determined together.
- 8 I raised the *Mokebe* decision with Mr. Mohapi, who appeared for Mr. Rooplal before me. He quite properly conceded both the meaning and effect that I have ascribed to the *Mokebe* decision and that there are no special circumstances that, in this case, warrant a departure from the general rule established in *Mokebe*.
- 9 It follows that the application for the money judgment on the mortgage credit agreement cannot be granted, and that the matter will have to be postponed to allow Mr. Rooplal to supplement his papers and amend his relief to encompass special execution against the mortgaged property. I have given some thought to whether I should simply dismiss the application for the money

judgment, while making it clear that it is open to Mr. Rooplal to reinstitute an omnibus application for the money judgment and for leave to specially execute against the mortgaged property. But I can find nothing in the Act, or in the extensive common law that has grown up around the proportionality requirement derived from section 26 (1) of the Constitution, 1996, that requires this, whether expressly or by necessary implication. Nor are there any circumstances in this case that would favour making Mr. Rooplal reissue a fresh application.

10 I should also point out that, shortly before the matter was heard before me, Mr. Khangela appears to have made an application under section 86 (1) of the Act to have himself declared over-indebted. In light of the provisions of section 86 (2) of the Act, and the decision of the Supreme Court of Appeal in *Nedbank v National Credit Regulator* 2011 (3) SA 581 (SCA), it seems unlikely that the debt review application would affect Mr. Rooplal's right to press on with the enforcement of the mortgage credit agreement. In any event, the effect of the application for debt review, if any, on Mr. Rooplal's application can be addressed, to the extent necessary, in his supplemented application.

11 I do not think that it would be right to order Mr. and Mrs. Khangela to bear the costs of the postponement. Mr. Rooplal chose to enrol the application for the money judgment despite the clear – albeit general – rule established in *Mokebe*. In her judgment on the motor vehicle credit agreement, Robinson AJ reserved costs. The costs up to and including the hearing before Robinson AJ should remain reserved. The costs arising between the date of Robinson AJ's

judgment and this judgment will be paid by Mr. Rooplal in his capacity as VBS' liquidator.

12 Accordingly, I make the following order –

12.1 The relief sought in respect of the Large Mortgage Credit Agreement concluded between VBS Mutual Bank and the respondents (FA4 to the founding affidavit) is adjourned *sine die*.

12.2 The applicant is granted leave to supplement his papers and to amend his notice of motion to incorporate relief declaring the mortgaged property (described as 538 Furrow Road, Featherfalls Estate, Erf 538 Homes Haven Ext 16, Mogale City Local Municipality) specially executable.

12.3 The respondents are granted leave to supplement their answering papers in response to the applicant's supplemented relief, by no later than 15 days from the date on which the applicant's supplemented papers are served on them.

12.4 The costs of this application arising on or before 28 April 2021 shall remain reserved. The applicant is directed to pay the costs of the application arising between 29 April 2021 and 5 November 2021, inclusive.



S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 5 November 2021.

HEARD ON: 28 October 2021

DECIDED ON: 5 November 2021

For the Applicant: S L Mohapi
Instructed by Werksmans Incorporated Attorneys

For the Respondents: Mr. Khangela appearing in person on his own behalf, and on behalf of the second respondent.