

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO: 6656/2011**

**NEDBANK LIMITED**

Plaintiff

and

**ASHWIN JESSA**

First defendant

**VIMALA JESSA**

Second defendant

**AND**

**CASE NO: 15274/11**

**ABSA BANK LIMITED**

Plaintiff

and

**ABIGAIL ELIZABETH MORULANE**

Defendant

**AND**

**CASE NO: 15388/2011**

**FIRSTRAND BANK LIMITED**

Plaintiff

and

**EUGENE AUGUST HENDRICKS and**

First defendant

**RAMONDE HENDRICKS**

Second defendant

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**JUDGMENT DELIVERED ON 20 DECEMBER 2011**

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**BLIGNAULT J:**

[1] These three applications, *Nedbank Limited v A and V Jessa*, *Absa Bank Limited v A E Morulana* and *Firststrand Bank Limited v E and R Hendricks*, have certain features in common. They are representative of a number of applications that were recently heard by me in motion court.

[2] The plaintiff in each case is a registered bank. It applies for default judgment against the defendant. The summons in each case follows a standard pattern. The bank claims a capital amount from the defendant in respect of monies lent and advanced to him and interest thereon. The relief sought by the bank contains an order declaring certain immovable property of the defendant executable. In each case the property in question is used for residential purposes and it is encumbered by a mortgage bond in favour of the bank. The mortgage bond contains a clause which entitles the bank to have the mortgaged property declared executable.

[3] The summons, I may add, also contains allegations regarding compliance by the bank of certain provisions of the National Credit Act 34 of 2005 ("the NCA"). This judgment, however, is not concerned with the provisions of the NCA or the application thereof.

[4] This judgment deals with two issues that frequently arise in this kind of cases:

- (1) The first issue concerns the content of the clause which is intended to inform the defendant of his rights under section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
- (2) The second issue is the practice of the banks to place an affidavit with relevant information before the court at the hearing of the matter.

#### **The section 26 rule of practice**

[5] The summons in each case contains a paragraph with the following wording:

*"The defendant's attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court."*

[6] This paragraph has its origin in the judgment of the Supreme Court of Appeal in *Standard Bank of SA Ltd v Saunderson and Another* 2006 (2) SA 264 (SCA). The reasoning behind it is set out in para [25] of the judgment:

*“... ..it seems to us desirable that the defaulting debtor should be informed, in the process of initiating action, that s 26(1) may affect the bond-holder's claim to execution. ... ..it is in our view desirable to lay down a rule of practice requiring a summons in which an order for execution against immovable property is sought to inform the defendant that his or her right of access to adequate housing might be implicated by such an order. It is plainly desirable that this development should be prospective only, and it is as well to make clear that existing summonses are not invalid for want of reference to s 26(1).*

*... ..*

*The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows.*

The *Saunderson* judgment then proceeded to formulate the rule of practice in the terms set out above.

[7] It is noteworthy that the reasoning and the rule of practice in *Saunderson* referred to sub-section 26(1) of the Constitution only and

not to sub-section 26(3). For ease of reference I quote these two sub-sections:

“26 (1) *Everyone has the right to have access to adequate housing.*

... ..

(3) *No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”*

[8] In the judgment of the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) the *Saunderson* judgment was in some respects overruled. It was made clear, amongst others, that it is not only the defendant's *right to adequate housing* in terms of sub-section 26(1) of the Constitution that must be considered before a residential property is declared executable but all *relevant circumstances* within the meaning of sub-section 26(3) of the Constitution. This is recognised in the recent judgment of a Full Bench of this court in *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) para [13].

[9] Meanwhile Uniform Rule of Court 46(1) was amended with effect from 19 November 2010 to read as follows:

***“46 Execution – Immovables***

(1) (a) *No writ of execution against the immovable property of any judgment debtor shall issue until –*

(i) *A return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or*

(ii) *Such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances. Orders execution against such property.”*

[10] It is obvious that the amended rule 46(1) introduced the same requirement for an order declaring residential property executable as sub-section 26(3) of the Constitution, namely consideration of *relevant circumstances*.

[11] I may point out that although the Full Bench of this court in the *Bekker* judgment quoted the *Saunderson* rule of practice, it did not purport to approve of the precise content thereof. This is made clear, amongst others, from the passage which follows, in para [19], immediately after the quotation:

*“[19] The object of the [Saunderson] practice note is to alert defendants whose rights in terms of s 26 of the Constitution could be infringed by execution against the mortgaged property to bring the relevant facts to the court’s attention.”*

[12] I am therefore of the view that the *Saunderson* rule of practice should be amplified to include an appropriate notification to the defendant that he is entitled to place information regarding *relevant circumstances* within the meaning of section 26 (3) of the Constitution and Uniform Rule of Court 46(1), before the court hearing the matter.

[13] I must make it clear, finally, that my proposed amendment of the *Saunderson* rule of practice does not purport to have any retrospective effect.

### **Plaintiff's Supplementary Affidavit**

[14] The second issue to be dealt with in this judgment is the practice on the part of plaintiffs to submit information regarding relevant circumstances to the court by way of an affidavit which is frequently not served on the defendant.

[15] In my view this practice should not be followed. It is in direct conflict with the right to a fair hearing which is embodied in section 34 of the Constitution. This provision reads as follows:

***“34. Access to courts.—Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”***

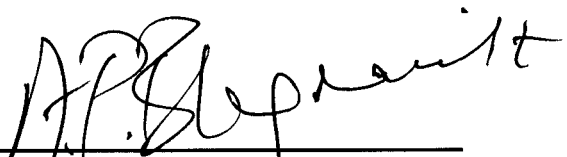
[16] In *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) para [36] Ackermann J described the *audi alteram partem* rule is one of the main pillars of the section 34 fair hearing right.

[17] If it is intended to place additional facts regarding relevant circumstances before the court, they should be alleged in plaintiff's



summons and served on the defendant. This is the procedure envisaged in para [29] of the *Bekker* judgment.

[18] In all three these cases orders are granted as prayed for.

  
A P BLIGNAULT