THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 19353/2019

In the matter between

CHANGING TIDES 17 (PTY) LTD N.O. **APPLICANT**

And

NEAL FRASENBURG **RESPONDENT**

Coram: Rogers J

Heard: 17 June 2020

Delivered: 2 July 2020 (by email to the parties and release to SAFLII)

JUDGMENT

Rogers J

[1] The plaintiff,/applicant, Changing Tides 17 (Pty) Ltd N.O., seeks default judgment against the defendant/respondent, Mr Neal Frasenburg, on a dense suite of agreements by now unpleasantly familiar to judges around the country together with an order declaring the mortgaged property specially executable.

[2] Summons was issued in November 2019. No notice of intention to defend was filed. The plaintiff delivered an application for default judgment together with an application in terms of rule 46A to have the mortgaged property declared specially executable. These applications were served on the defendant, who filed a notice of opposition followed by an opposing affidavit. The applications were postponed for hearing on the semi-urgent roll on 17 June 2020.

[3] Although the defendant was legally represented when the applications first served before court on 28 February 2020 and up to the time of the filing of his opposing affidavit, his attorneys later withdrew.

[4] The plaintiff seeks judgment for R264 114,26 plus interest at the agreed rate from 14 October 2019. The defendant's answering affidavit does not disclose a defence on the merits. The focus of attention is whether, and if so on what terms, the mortgaged property should be declared specially executable. The mortgaged property is the defendant's primary residence. When summons was issued the defendant was six months in arrears. By the time default judgment was sought, the arrears were R32 385, equating to about nine months' instalments. According to the plaintiff, the market value, local authority value and forced sale value of the property are R580 000, R515 000 and R490 000 respectively.

[5] It appears from the papers that the defendant and his ex-wife bought the property in 1989. Following their divorce in 2012, the defendant purchased his ex-wife's half-share of the property with finance provided under the suite of agreements previously mentioned. The loan agreement was concluded in March 2012 and the indemnity bond was registered in May 2012.

[6] In early 2016 the defendant, following 35 years' service with Transnet, was dismissed. The defendant says that an unfair dismissal case is pending. Pursuant to his dismissal, the defendant received payment of about R1,3 million as his accumulated pension fund interest. On the advice of a Nedbank investment broker, he invested R1 million with Old Mutual in an insurance product with a five-year term. He kept the balance to cover his living expenses and pay sundry debts. He tried to earn money by trading in frozen goods, an endeavour that went well for a time before going into decline. During 2017 and 2018 the defendant made two withdrawals from his Old Mutual investment, one of which was a loan against the investment.

[7] Until April 2019 the defendant regularly paid the monthly instalments on his bond. The last such instalment was paid on 28 March 2019. By that time he was in financial difficulty. To make matters worse, the Old Mutual investment was not performing as he had been led to expect. He thus tried to terminate the investment. Old Mutual refused to allow an early termination and did not permit any further withdrawal. (These limitations appear to accord with the investment agreement.) The investment will mature on 24 May 2021.

[8] The defendant lodged a complaint with the FAIS Ombud about the investment advice received from the Nedbank broker. On 7 November 2019 the Ombud rejected the complaint, finding that it was not borne out by the documentation signed by the defendant. The defendant applied to the Financial

Services Tribunal for a reconsideration of the Ombud's ruling. On 14 January 2020 the Tribunal, per its Deputy Chairperson, (retired) Justice L T C Harms, dismissed the application. The defendant wishes to take the Tribunal's decision on judicial review. In the meanwhile, the defendant's arrears were growing, leading to the issue of summons in November 2019.

[9] The defendant told me that his erstwhile attorneys had made some progress in preparing the review application. Those attorneys subsequently ceased acting for him (presumably for lack of funds). Several weeks ago he secured the services of new lawyers, Simon Dippenaar Attorneys ('SDA'). He had thought that they would liaise with Ms Moodley, the advocate who appeared for him on 28 February 2020 on the instructions of his former attorneys, and that Ms Moodley would represent him at the hearing on 17 June 2020. He was thus surprised to receive a message from his new attorneys on 15 June 2020 to say that he should come to court and represent himself.

[10] At this point I stood the matter down so that Mr Jonker, the plaintiff's counsel, could contact SDA to find out what was going on. From Mr Jonker's subsequent report to me, it seems that there is some confusion or misunderstanding as to the ambit of SDA's mandate. According to Mr Kennedy of that firm, they have only been engaged to finalise and pursue the review application. Although the defendant told them about the pending foreclosure proceedings, they had not accepted a mandate to represent him in these proceedings.

[11] In the light of this information, I allowed the plaintiff's counsel to make his submissions in support of the applications for default judgment and special executability. The defendant then addressed me. I explained to him, and I believe he accepted, that he had no defence on the merits of the case. I also explained to

him that the review application, on which he seemed to be pinning his hopes, had not yet been issued and was likely to take at least six to nine months to be heard, and that the losing party might wish to appeal. His investment with Old Mutual would in all likelihood mature before finality was reached on the review application.

[12] I asked the defendant whether he had considered offering his Old Mutual investment to the plaintiff as security for the repayment of his loan indebtedness. The defendant said that his lawyers had not raised this possibility with him. I can readily understand that as a layperson he knew nothing about this mechanism. He told me that the current value of his Old Mutual investment is about R800 000. I explained to him as plainly as I could the workings of a pledge (ie a cession *in securitatem debiti*). Using rough figures, if by May 2021 his indebtedness to the plaintiff had, with interest, grown to R300 000, the plaintiff would take this amount when the investment matured in settlement of the defendant's mortgage debt, and the defendant would receive the balance of R500 000. He would then own his house free of a mortgage bond. The defendant indicated that he would certainly consider this option if it were the only way of saving his house.

[13] In reply, the plaintiff's counsel, while not abandoning the application for special executability, submitted in the alternative that I should grant judgment for the money debt, which would allow the plaintiff to attach the Old Mutual investment. He submitted that, given the approval processes within the plaintiff's organisation and legal fees, the cost of attaching the investment would be less than the cost involved in drafting and procuring the defendant's agreement to a deed of pledge and would achieve the same practical result.

[14] I think the plaintiff's counsel took it for granted that if a money judgment were granted, and if the plaintiff were to attach the Old Mutual investment, the

plaintiff would wait for the attached investment to mature on 24 May 2021. If that were to happen, the attachment would indeed achieve the same practical result as a pledge. However, following attachment it would notionally be possible for the plaintiff to arrange for the attached investment to be sold in execution, and a third party might be willing to buy the investment for an amount sufficient to discharge the plaintiff's claim and yet at a substantial discount to the true value of the investment. This could be very prejudicial to the defendant, but the danger could be eliminated by an appropriate qualification in my order.

[15] It seems to me that the appropriate form of attachment for the plaintiff to pursue, if it were granted the money judgment, would be by way of a garnishee order in terms of rule 45(12). The Old Mutual investment is a debt owing to the defendant even though it is not yet due and cannot yet be exactly quantified. It is not subject to any restrictions regarding cession or attachment. Service upon Old Mutual of a garnishee order would require Old Mutual on 24 May 2021 to pay to the sheriff so much of the matured investment as is sufficient to satisfy the judgment debt.

[16] The plaintiff's counsel, in putting forward this alternative, drew my attention to the fact that there are full court judgments in Gauteng and in this division to the effect that it is undesirable, in foreclosure cases, to deal with the money judgment separately from special executability. He submitted, however, that this could not be regarded as an inflexible rule.

[17] Before discussing these judgments, I must clarify the following. Before the introduction of rule 46A, it was the norm, in bond foreclosure cases, for creditors to seek an order declaring the mortgaged property to be 'specially executable'. This expression currently has its source in rule 46(1)(*a*)(ii), formerly in rule 45(1). In the ordinary course, and in the absence of an order for special

executability under rule 46(1)(*a*)(ii), a creditor with a money judgment could not levy execution against immovable property without excussing the debtor's movables in accordance with rule 46(1)(*a*)(i). Having excussed movables in terms of rule 45, the creditor did not need the court's intervention before executing against the immovable property.

[18] Before the enactment of rule 46A, a creditor, whether or not it was a mortgagee, was not obliged to seek an order of special executability. The creditor could simply get a money judgment and follow the usual process of execution by excussing movables, followed if necessary by execution against immovable property. The default position was clearly conceived of as favouring debtors. It is of ancient origin: it was laid down in the erstwhile rules of the provincial divisions and pre-Union colonies and republics; it prevailed in Holland (Voet 42.1.42), and has its source in Roman law (D 42.1.15.2; see also Kaiser *Roman Private Law* 3 ed (tr Dannenbring) §87.I.10 at 429 and §87.III.2(a) at 433).

[19] To allow the creditor to bypass the default position by obtaining an order for special executability was an advantage to the creditor which had to be justified. The fact that the property in question had been mortgaged to the creditor was regarded as sufficient justification for an order of special executability. It is a standard provision in mortgage bonds that upon default the mortgagee will be entitled to claim an order declaring the property specially executable (*LAWSA* 2 ed Vol 17(2) para 364), and the indemnity bond in the present case contains such a clause, but even without it the hypothecation was regarded as sufficient justification for an order of special executability (*Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 (4) SA 134 (C) at 135C; *Nedcor Bank Ltd v Kindo & another* 2002 (3) SA 185 (C); *LAWSA ibid* para 368 fn 8). However, an unsecured creditor could also ask for and get an order of special

executability if it was justified (*Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 (4) SA 600 (C).

[20] Rule 46A does not repeal the above general principles and the default regime contained in rule 46(1)(*a*)(ii). Rule 46A is not concerned with special executability *per se* but with all instances of execution against 'residential immovable property', whether specially in terms of rule 46(1)(*a*)(ii) or ordinarily in terms of rule 46(1)(*a*)(i). If a mortgagee of residential immovable property were simply to ask for and get a money judgment, and then wished, after excussing movables, to levy ordinary execution against the mortgaged property, rule 46A would require the mortgagee to bring an application in terms of rule 46A. Such a mortgagee would not be seeking an order of special executability, but rule 46A would still apply.

[21] The default mode laid down in rule 46(1)(*a*) evidently exists in the interests of judgment debtors. Rule 46A, which contains no language abrogating the default mode, has also been enacted for the benefit of judgment debtors; it adds an additional layer of protection by ensuring judicial oversight in cases of execution against residential immovable property.

[22] I turn now to the full court judgments. The Gauteng judgment is *Absa Bank Ltd v Mokebe & related cases* [2018] ZAGPJHC 487; 2018 (6) SA 492 (GJ). The full court there held that in bond foreclosure cases the creditor should seek its money judgment and a rule 46A order of executability in the same proceedings, and that the court should hear them together. In para 13 the full court said that 'to grant judgment for the repayment of the accelerated money debt and to postpone the relief to declare the hypothecated immovable property specially executable' was a course giving rise to 'an undue protraction of the proceedings and piecemeal handling of the matter with a resultant increase in costs'.

[23] Although the full court did not in terms distinguish between ordinary and special execution against immovable property, para 13 suggests that the court was only concerned with cases where a mortgagee sought an order of special executability. In such cases it was the invariable practice, even before the introduction of rule 46A, for the money judgment and the order of special executability to come before the court at the same time.

[24] It seems to me that the balance of the full court's judgment is premised on the usual situation in bond cases, where the mortgagee prays for an order of special executability together with the prayer for the money judgment. To the extent that the full court suggests that a bank is compelled to seek an order of special executability, this would be a drastic departure for which I find no support in the new rule 46A. Indeed, the new rule 46A seems to point in the other direction, as I shall show.

[25] In para 22 the full court said that it was thus both 'desirable and necessary' for the money claim and the '*in rem* claim' 'to be heard simultaneously' (para 22). As I have said, the '*in rem* claim' which the full court was considering was a claim for an order of special executability in terms of rule 46(1)(*a*)(ii).

[26] In para 28 the full court said the following:

'We do not deal hearing with the matter where a lender sues for money lent and advanced and does not rely on the security of a bond. Such lender who abandons reliance on its security, cannot introduce it at a future date to obtain a judgment for special executability and its execution will be without the benefits afforded by a mortgage bond, due to the bar to bring matters piecemeal. The banks argued that the unsecured creditor is in a better position than a secured creditor because the former is able to obtain a money judgment without any baggage, should the claim be pleaded correctly whilst the mortgagee has an additional onus. The argument does not pass muster. Rule 46A is not confined to secured creditors. The unsecured creditor armed with its judgment without security, has an obligation to satisfy the court of its entitlement to have a primary home declared executable, and not specially, in the same manner

that is provided for in rule 46A. It has a more onerous process to follow. This obligation arises at a next court proceeding, after executing against other property of the debtor. The comparison and perceived more onerous obligation on the mortgagee is consequently not valid.'

[27] If the first three sentences of this passage mean that a mortgagee who sues for a money judgment without asking for an order of special executability is thereby abandoning reliance on, and loses the benefit of, its security, I cannot agree. The mortgagee can plead a perfectly sound cause of action for the payment of money without seeking to bypass the default mode of execution laid down in rule 46(1)(*a*). The absence of a claim by the mortgagee for special executability does not show an intention to abandon its security. The failure to seek and get an order of special executability simply means that, although the mortgage remains in place as real security, the mortgagee must follow the ordinary process of execution, excussing movables before executing against the immovable property. That this can be done appears from an earlier full court judgment in the former Transvaal Provincial Division: see *Gerber v Scholtz & others* 1951 (2) SA 166 (T) where, due to an oversight, the mortgagee's summons had not included an order declaring the mortgaged property specially executable. See also *Prudential Building Society v Botha* 1953 (3) SA 887 (W) where there had been a similar oversight.

[28] Regarding the balance of para 28 of the full court's judgment, it is of course so that an unsecured creditor who has obtained a money judgment and excussed movables will, by virtue of the new rule 46A, have to come back to court if it wishes to execute against residential property. A mortgagee who has obtained a money judgment without seeking or getting an order of special executability is in exactly the same position.

[29] In para 29 the full court said that it was the duty of a mortgagee to bring its entire case forward in one proceeding simultaneously, and that if the case required

postponement for whatever reason, the entire matter had to be postponed and that ‘piecemeal adjudication is not competent’. The ‘entire case’ contemplated in this paragraph appears to be the case for a money judgment together with an order of special executability. I have explained why I do not read the rules as compelling the bank to seek an order of special executability and why failure to do so does not cause the bank to lose its security or preclude it from later seeking to levy execution on the mortgaged property.

[30] I also do not agree that it is ‘not competent’ to grant a money judgment while refusing (or deferring) an order of special executability. It must follow, from the fact that the mortgagee can seek a money judgment without claiming an order of special executability, that if the mortgagee claims both forms of relief it is competent for the court to grant the money judgment while refusing (or deferring) the claim for special executability.

[31] I do accept, though, that where an order of special executability is claimed (as it generally is in bond foreclosure cases), the claims for the money and for special executability should ordinarily be disposed of together. Indeed, it has hitherto been the almost invariable case for such claims to come before court at the same time. If, at such hearing, the court requires further information in order to make the assessment required by rule 46A, it may well be desirable to postpone the claim for the money judgment together with the claim for special executability. Similarly, if the arrears are trifling and execution against the mortgaged property would be disproportionate, it may well be desirable to postpone the claim for the money judgment together with the claim for special executability to afford the debtor an opportunity to regularise his or her account, or the parties time to negotiate a rescheduling, without having a judgment entered against him or her. Such a course would be a matter of judicial discretion,

informed by policy considerations arising from s 26 of the Constitution, rule 46A and the National Credit Act 34 of 2005.

[32] However, it is quite conceivable that at such a hearing the court will find it is just to grant the money judgment but to refuse or defer an order of special executability, eg where there is evidence that the debtor has other assets from which to satisfy the judgment. In such a case, as I see it, the court would act quite properly, and in accordance with the rules, by (a) granting the money judgment (if there is no defence on the merits) and (b) postponing or refusing the claim for special executability, leaving the creditor to act in accordance with rule 46(1)(*a*).

[33] In *Mokebe* the banks evidently argued that, even though the money judgment and the order of special executability should be brought forward as part of the same proceedings, it did not necessarily follow that the court was precluded, pursuant to such hearing, from granting a money judgment but refusing or postponing the application for special executability. In that regard, the full court said the following in para 23:

'It was argued that rules 46 and 46A anticipate the possibility, though not necessarily, of a money judgment preceding an order of executability. However, the submission of rule 46(1)(a)(i) presupposes that a money judgment may be obtained separately from, and prior to, an order of executability cannot be upheld. The very fact that both the money judgment and the order for executability are given at the same time is not in conflict with the rule which requires certain steps against movables prior to execution against the immovable property. It is purely a prior procedural step before a writ against the immovable property is issued. It is a step separate from the monetary judgment and the order declaring the immovable property executive.'

[34] I have several difficulties with this passage. In the first place, the contemplation in the rules (that a money judgment may be obtained before an order of executability) is not located only or even mainly in rule 46(1)(*a*) but in the new rules 46A(2)(*a*)(ii) and 46A(8)(*d*). These rules require the court to

consider whether there are alternative or other satisfactory means by which the 'judgment debtor' may satisfy the 'judgment debt'. These expressions envisage that there may be a judgment debt without an order of special (or ordinary) executability. The judgment debt contemplated in these rules is self-evidently the money judgment.

[35] Even before the introduction of rule 46A, our courts had held that in deciding whether to grant or refuse an order of special executability, the question whether the judgment debtor could satisfy the debt in some other reasonable way had to be judicially considered (*Gundwana v Steko Development & others* [2011] ZACC 14; 2011 (3) SA 608 (CC) paras 53-54; *FirstRand Bank Ltd v Folscher & another, and similar matters* [2011] ZAGPPHC 79; 2011 (4) SA 314 (GNP) para 41). These statements clearly envisaged that a money judgment might be granted but an order of special executability refused or deferred. And if a mortgagee, at the time of issuing summons, reaches the view that the circumstances are such that a court will probably not grant an order of special executability, the mortgagee must be entitled to issue summons for the money alone.

[36] In the second place, and flowing from the first point, the excussion of movables (which is the default position, absent an order of special executability) can only take place if there is a money judgment. The excussion of movables is not 'purely a prior procedural step', if by this the full court meant something that could happen without a money judgment. And this 'prior procedural step', for which a money judgment is a pre-requisite, only has to be observed by the judgment creditor if it has not obtained an order of special executability.

[37] Rule 46A does not contemplate that the money judgment will be withheld, and that the creditor and debtor will explore consensual ways of satisfying the creditor's claim without the need to sell the immovable property. Rule 46A

contemplates that the debtor will be a ‘judgment debtor’ and that the creditor’s claim will be a ‘judgment debt’. In most cases of foreclosure against residential immovable property, the banks will already have engaged with the debtors to explore consensual ways of regularising the delinquent account before issuing summons and will have continued to do so up to the time of judgment.

[38] At least in Gauteng, *Mokebe* appears to stand as authority for the proposition that a court cannot grant a money judgment without simultaneously granting an order of special executability. If it refuses or defers the latter, it must refuse or defer the former. See, for example, *Changing Tides 17 (Pty) Ltd NO v Mabiletsa & others; Absa Bank v Montwetsana* [2018] ZAGPJHC 605; [2019] 1 All SA 619 (GJ) paras 2 and 29. For reasons set out above, I respectfully regard that conclusion as wrong; it appears to me to be inconsistent with earlier authority, inconsistent with the wording of rule 46A, and inconsistent with the range of options open to the court in terms of rule 46A(8).

[39] Accordingly, and subject to any binding authority in this division, I do not accept that a court may not grant a money judgment without granting an order of executability (special or otherwise) against the mortgaged property. I do accept, though, that where a bank in fact seeks an order of special executability as contemplated in rule 46(1)(*a*)(ii), it is desirable that such claim and the money claim should be considered together. In the absence of grounds to believe that the debtor will be able to regularise the delinquent account within a reasonable period of time or satisfy a judgment debt from other resources, there is no benefit to anyone in ‘postponing the evil day’ by granting the money judgment but deferring the application for special executability. This will simply lead to delay and additional cost.

[40] The full court judgment of this division is *Standard Bank of South Africa Ltd v Hendricks & another and related cases* [2018] ZAWCHC 175; 2019 (2) SA 620 (WCC). As I read the court's judgment, it adopted a more nuanced approach than *Mokebe* and did not associate itself with the propositions in *Mokebe* with which I have expressed disagreement. The full court in *Hendricks* was asked to address nine questions, of which questions 3, 4 and 5 are relevant for present purposes.

[41] In question 3 the court was asked to consider the circumstances under which it may be appropriate to grant a money judgment but postpone the application to declare the mortgaged property specially executable, given the impact on costs and the potential for attachment and execution of movables in the meantime. Question 4 asked whether the court has a discretion to decline to grant a money judgment and whether there are considerations to which regard should be had to ensure uniformity of treatment in that regard. Question 5 was whether the postponement of an application for the money judgment under certain circumstances was objectionable or desirable.

[42] In relation to these questions, the full court held, in the first place, that the claims for the money judgment and for an execution order should be sought and heard together (para 40). Having regard to the formulation of question 3, the full court was evidently considering the case where the mortgagee in fact seeks an order of special executability. The principal reasons given by the full court for requiring the money claim and a claim for special executability to be brought and heard together were that it 'creates predictability and certainty, reduces costs and avoids overburdening the court' (para 38). This procedure not only had cost advantages but would limit 'piecemeal adjudication' (para 40).

[43] The full court did not state that a mortgagee is obliged to seek an order of special executability, failing which it loses its security and/or is precluded from later seeking leave to execute against the mortgaged property. However, the full court held that the loan agreement itself, and not merely the mortgage bond, has the potential to impact the debtor's right of access to housing guaranteed by s 26 of the Constitution (para 48). It follows that even if a mortgagee were to seek a money judgment without asking for an order of special executability, the court considering the application for the money judgment would still have to consider the implications of s 26 of the Constitution. Although rule 46A would not yet apply, the court would be entitled to insist, and should, I venture to suggest, insist, on personal service of the application for judgment, just as would be required if an order of executability were being sought at that stage.

[44] Although the full court said that the claim for the money and the claim for special executability (assuming there is such a claim) should be brought and heard together, the court did not, as in *Mokebe*, say that it was not competent for a court, after hearing both claims, to grant the money judgment and dismiss or postpone the application for special executability.

[45] The full court considered an argument by the banks that courts do not have a general discretion to postpone an application for a money judgment where there is no defence on the merits. It was in this context that the full court held that, because the money judgment (arising from the loan agreement) has the potential to adversely affect the debtor's rights under s 26 of the Constitution, the court indeed has the power to postpone the money judgment together with the application for special execution (para 48). This power was described as discretionary (para 49), to be exercised in accordance with 'the interests of justice' and 'in appropriate circumstances' (paras 48 and 51).

[46] I am not aware of any other authority in this division which dictates that a court cannot grant a money judgment if it refuses or postpones an order of special executability.

[47] In the present case, the plaintiff sued for a money judgment and for an order of special executability. In accordance with *Hendricks*, the claims were brought in a single summons and were simultaneously placed before court for adjudication. If, following an assessment of the factors set out in rule 46A, I were to come to the conclusion that it is not just, at least at this stage, to authorise execution against the mortgaged property, I would still be entitled to grant the money judgment. If the facts relevant to a proper assessment of the matters set out in rule 46A were uncertain, justice might dictate that the application for the money judgment and the application for special executability should both be postponed, and *Hendricks* confirms that I would have the discretionary power to postpone the application for the money judgment.

[48] The full court in *Hendrick* was rightly concerned that the granting of a money judgment while refusing or deferring an order of special executability might compel the mortgagee to excuss movables in circumstances where there is

no prospect of the judgment being satisfied from the debtor's movables. It is notorious that the usual household effects possessed by the ordinary judgment debtor realise very little in execution but are expensive to replace. I fully agree that the withholding of an order of executability in such circumstances is most undesirable, since it denudes the judgment debtor of his or her movable assets and causes him to her to become liable for the futile costs of levying execution against the movables without ultimately saving his or her house.

[49] I should add that the potential hardship for a debtor of execution against movables is exacerbated by the fact that s 45 of the Superior Courts Act 10 of 2013, which envisages that certain basic necessaries of life as specified by regulation may be rendered immune from attachment, has not yet been brought into operation. Despite this state of affairs, the lawmaker saw fit to repeal the whole of the Supreme Court Act 59 of 1959, including the protection afforded by s 39 thereof which s 45 of the new Act was intended to supersede, without any transitional protection for judgment debtors. The anomaly is heightened by the fact that in the case of judgments granted in the lower courts, such protection has always existed, and continues to exist, by virtue of s 67 of the Magistrates' Courts Act 32 of 1944, which mirrors the terms of the repealed s 39 of the Supreme Court Act.

[50] The process of execution is ultimately under the control of the court (*Graham v Graham* 1950 (1) SA 655 (T) at 658; *Strime v Strime* 1983 (4) SA 850 (C) at 852A; *Windybrow Theatre v Maphela & others* [2016] ZALAC 27; (2016) 37 (ILJ) 2641 (LAC) para 17). The seizure of the necessaries specified in the repealed s 39 (eg beds, bedding and furniture, wearing apparel, food and drink) may impact adversely on various fundamental rights of debtors and their families, including their right to human dignity (s 10), their right to food and water (s 27(1)) and the rights of children (s 28(1)), and would result in irrational

differentiation between judgments debtors in the higher and lower courts. In the circumstances, and pending legislative regulation, it is within the court's power, in the exercise of its inherent jurisdiction, to decree, when granting a money judgment, that movables as specified in s 67 of Act 32 of 1944 may not be attached and sold in execution in satisfaction of the judgment, and I venture to suggest that it would generally be desirable to do so.

[51] In making the rule 46A assessment, the prospect of the judgment debt being satisfied without recourse to the mortgaged property has to be investigated. If a debtor is substantially in arrears and fails to place information before court pointing to the existence of other assets from which the indebtedness might be satisfied, a court would generally be justified in proceeding on the basis that execution against the mortgaged property is the only means of satisfying the mortgagee's claim.

[52] If, however, it emerges from the rule 46A assessment that there are other assets from which the mortgagee's claim can be satisfied, the court would be justified in granting the money judgment but postponing or refusing an order of special executability. This is not only in accordance with the default mode of execution which has since time immemorial been embedded in our law; rule 46A itself points in that direction by requiring the court to consider whether the judgment debtor has other means from which the judgment debt can be satisfied and to withhold an order of executability against the residential property if such other means exist (rule 46A(8)(*d*)). In such circumstances the court is not compelling the mortgagee to seize the debtor's proverbial pots and pans or (as alluded to in *Hendricks*) the debtor's sewing machine. The court is instead insisting that the mortgagee execute against other assets of substance which are known to exist.

[53] In the present case, I do not regard the facts relating to the rule 46A assessment as uncertain. The defendant has confirmed that apart from ordinary household goods, his only assets are the house and the Old Mutual investment. Any income he is able to earn is too sporadic and uncertain to be a source from which he could ever meet his obligations to the plaintiff.

[54] It is not often, in bond foreclosure cases, that the debtor has a source other than the mortgaged property from which he or she is able to discharge the obligation to the creditor. In this case, however, there is such an asset. It would not be just for the defendant to lose a home in which he has lived for about 40 years. He only needed mortgage finance in 2012 to buy out his ex-wife's half-share of the property. He faithfully met his bond instalments until April 2019, despite the fact that he lost his job in early 2016. He acted prudently (or so he thought at the time) by investing R1 million with a reputable insurance company. He is unfortunately unable to access the balance of this investment at the moment, but the investment will, within a period of just under 11 months, yield substantially more than he will need to discharge his mortgage bond in full.

[55] As to the money judgment, the arrears are not trifling. As at January 2020 he was nine months in arrears, his last instalment having been paid on 28 March 2019. By now he is about 15 months in arrears. By May 2021 he will be 26 months in arrears. I do not think that it would be right to postpone the claim for the money judgment until after 24 May 2021. If the money judgment were withheld, the plaintiff would not be entitled to attach the Old Mutual investment. If the plaintiff cannot attach the investment, its entitlement to have its judgment satisfied from that investment might be jeopardised if the defendant were sequestrated or if another creditor were to obtain judgment against him.

[56] By granting the money judgment, I do not place the defendant's home in any real peril, because all indications are that the Old Mutual investment will yield more than enough to satisfy the plaintiff's claim. Moreover, by virtue of s 23A(2) of the Superior Courts Act 10 of 2013 (a section which came into force on 11 March 2019), the entering of judgment against the defendant will not be to his long-term detriment, since once the judgment debt had been settled, he will be entitled to have the judgment rescinded.

[57] Although the plaintiff will have to wait 11 months for its money, there seems to be no danger – if it attaches the investment – that it will not on 24 May 2021 receive payment in full, including the further interest that will accrue over the 11-month period. And the true delay is not 11 months. If the plaintiff were granted an order of special executability, it would not be entitled, during the current level of the Covid-19 lockdown, to act on the order. Once restrictions were eased, it would take two to three months for a sale in execution to be held, and some weeks after that for transfer to be passed and the purchase price paid. So the true contrast is probably between payment in about five months time (pursuant to special executability) or eleven months time (pursuant to attachment of the Old Mutual investment).

[58] Since this is the course I intend to follow, it is unnecessary to deal with the reserve price which the plaintiff put up in its rule 46A application, save to state that the plaintiff's calculation was suspect in many respects.

[59] Clause 8.2 of the indemnity agreement contains a provision for High Court costs but as I read that clause it applies only if the magistrate's court does not have concurrent jurisdiction. In any event, costs always remain in the court's discretion. Quite apart from a concern for the interests of debtors, the High Court has its own legitimate interest in discouraging the use of its resources for cases

that fall within the jurisdiction of the Magistrates' Courts. Similar considerations apply to clause 9 of the indemnity agreement, which provides that the plaintiff is entitled to attorney and own client costs. I am not bound by, and do not intend to give effect to, that clause. The costs reserved on 28 February 2020 and 24 March 2020 must be costs in the cause.

[60] Whether a High Court has the power to decline to exercise concurrent jurisdiction over a claim falling within the jurisdiction of the Magistrates' Courts remains an open question. I gather that the question will come before the Supreme Court of Appeal in the near future. However, that recourse to the High Court in such circumstances should be discouraged seems to me obvious. To limit such plaintiffs to Magistrates' Courts costs might by and large neutralise the burden on defendants but is hardly a sufficient disincentive to plaintiffs. Since this question was not raised with the plaintiff's counsel during argument, I do not intend to deprive the plaintiff of costs altogether, but it seems to me that serious consideration should in future be given to following such a course. Indeed, I understand that there may be judges in this division who have already begun to do so.

[61] I make the following order:

(a) Judgment is granted in favour of the plaintiff in the amount of R264 114,26 together with interest thereon at the rate of 10,3% per annum, compounded monthly in arrear from 14 October 2019 to date of payment.

(b) The defendant must pay the plaintiff's costs on the Regional Magistrates' Courts scale, including those reserved by the orders of 28 February 2020 and 24 March 2020.

(c) The rule 46A application is postponed *sine die* in order to allow the plaintiff to attach the defendant's investment with Old Mutual (Old Mutual

Max Investments Portfolio Number 017806486 – 'the Old Mutual investment') in satisfaction of the amounts owing by the defendant to the plaintiff hereunder.

(d) The plaintiff may not, without the leave of the court, issue instructions for the sale in execution of the Old Mutual investment before 24 May 2021 but the plaintiff may forthwith request the sheriff to act in accordance with rule 45(12) by serving on Old Mutual a notice requiring the latter as garnishee to make payment to the sheriff in accordance with rule 45(12) when the investment matures on 24 May 2021.

(e) If for any reason the plaintiff does not on 24 May 2021 receive payment in full, or on other good cause shown, the plaintiff may, on notice to the defendant, re-enrol its rule 46A application, supplemented as needs be.

(f) The plaintiff may not cause to be attached or sold in execution, in satisfaction of this judgment, movable assets of the defendant as specified in s 67 of the Magistrates' Courts Act 32 of 1944.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

For Applicant	J W Jonker Instructed by Strauss Daly Inc 13th Floor, Touchstone House 7 Bree Street Cape Town
For Respondent	In person