



**OFFICE OF THE DEPUTY JUDGE PRESIDENT  
SOUTH GAUTENG HIGH COURT**

---

Private Bag X7

Telephone number: +27 11 335 0162/0163

JOHANNESBURG

Fax number: +27 11 335 0219

2000

e-mail: pvwyk@justice.gov.za

Republic of South Africa

**Our Ref: DJP/36/2012/ad**

---

TO: All Judges – South Gauteng High Court, Johannesburg

The Chief Registrar – South Gauteng High Court, Johannesburg

The Chairman, Johannesburg Society of Advocates

The Chief Executive Officer / Director, Law Society of Northern Provinces

The Chairman, Advocates for Transformation

The Chairman, National Forum of Advocates

The Chairman, Black Lawyers Association

The Chairperson, National Association of Democratic Lawyers (Gauteng)

The Director, National Prosecuting Authority: South Gauteng High Court

The Family Advocate, South Gauteng High Court

The Chairman, Johannesburg Attorneys Association

Dear All

PRACTICE DIRECTIVE NO. 01/2013

1. Kindly find herewith Practice Directive 01/2013 (on Foreclosures) with the accompanying pro forma affidavit, which comes into operation immediately. Please bring it to the attention of your members and bring their attention to the date on which the courts will insist on compliance.
2. For the information of legal practitioners I also enclose Explanatory Notes to the directive. These notes are not part of the Directive and are made available only for background information.

Yours faithfully

PM MOJAPELO

DEPUTY JUDGE PRESIDENT

SOUTH GAUTENG HIGH COURT

15 APRIL 2013

## PRACTICE DIRECTIVE

Number 01 / 2013

This Practice Directive on Foreclosure shall become Chapter 10.17 ( a new chapter) of the Practice Manual of South Gauteng High Court. It comes into effect immediately and shall be enforced in all court hearings from the week starting on Monday 22 April 2013.

### 10.17

#### FORECLOSURE

(AND EXECUTION WHEN PROPERTY IS, OR APPEARS TO BE, THE  
DEFENDANT'S PRIMARY HOME)

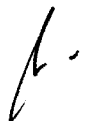
*This chapter is applicable to all applications for foreclosure (and execution when the property in question is, or appears to be, the defendant's primary home). The word 'defendant' in this context includes the word 'respondent' and vice versa. The word 'debtor' includes the word 'consumer' and refers to a 'judgment debtor'.*

1. Without derogating from the requirements regarding applications contained in the Rules Regulating the Conduct of the Proceedings of the Several Provisional and Local Divisions of the High Court of South Africa ('Rule' or 'the Rules') or Chapter 9 of the Practice Manual of the South Gauteng High Court ('Practice Manual'), in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required in which the matters set out below in this para 1, are stated **(with proper references to indexed page numbers and paragraphs)**. The affidavit shall, in foreclosure matters be attached to the Notice of Set down. The affidavit, a *pro forma* of which is attached, must contain the following:

6-

- 1.1.1 That the deponent is satisfied that a proper cause of action has been disclosed and that there is not a mere reliance on a security instrument.
- 1.1.2 That there is compliance with Rule 18(6); alternatively,
- 1.1.3 Sufficient facts have been disclosed and set out for a proper cause of action to be made out (also when a simple summons is issued).
- 1.2 That he or she has inspected the original documents pertaining to the matter as well as the security documents on which the matter is based and that the copies, attached to the summons or application, are true copies of the originals.
- 1.3 In the absence of 1.2 above that an affidavit from the judgment creditor setting out the whereabouts of the original documents, is attached, which affidavit must also set out the grounds of the deponent's belief that the documents attached are indeed true copies of the originals.
- 1.4 That the application or summons contains the statements referred to in *Saunderson<sup>i</sup>*, *Jessa<sup>ii</sup>* and *Dawood<sup>iii</sup>*.
- 1.5 That an affidavit pursuant to *Mortinson<sup>iv</sup>* has been filed or the facts required to be disclosed have been disclosed.
- 1.6 That there is compliance with *Folscher<sup>v</sup>*.

Note: When amounts are low, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of x months and that notice of set down should again be served.



- 1.7.1 That there was personal service of the process upon the consumer.
- 1.7.2 If personal service is not possible, that there was such service as was authorised by the court (*Powell* para 7.9). (See para 5 below.)
- 1.8 That if the action is founded on an agreement within the meaning of National Credit Act 34 of 2005, (NCA) it is to be confirmed that an allegation is contained in the summons, as to what manner of delivery, from those set out in s 65(2) of the NCA, the consumer has chosen for notices and that the notice was delivered in that manner.

In the case where the consumer has chosen for the notice to be posted and there is no proof of actual receipt of the notice:

- 1.8.1 that an allegation is contained in the summons or particulars of claim (or application) that the compulsory notice pursuant to section 129 (1) of the NCA ('the s 129 notice') was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of the registered item notification slip, informing the consumer that a registered article was available for collection;
- 1.8.2 that a post-despatch 'track and trace' print-out from the website of the South African Post Office is attached indicating delivery at the debtor's post office.
- 1.8.3 that, in the event of the post office reflected on the 'track and trace' report not being the same as the post office or town name to which the s 129 notice was sent, there is proof that the post office reflected on the 'track and trace'



report services the address of the consumer to which the s 129 notice was sent.

1.8.4 that a minimum period of 10 business days of giving of the statutory notice had elapsed before commencement of the legal proceedings and how the period is calculated, having regard to the receipt of the notice and service of the process.

1.8.5 ALTERNATIVELY to 1.8.1 - 1.8.4, that in the case of termination of a debt review pursuant to s 86(10) of the NCA, a notice pursuant to s 86(10) was given to the debtor, the debt counsellor and the National Credit Regulator at least 60 business days after the debtor applied for debt review.

1.9 That the return of service complies with 3 below.

1.10 The clause number in any agreement which provides for a costs order other than a party and party costs order or any other justification for a costs order other than a party and party costs order.

2. If there is a failure to comply with the requirement for service set out in 1.7 above, an order in terms of 5 below will, on application, be issued.

3. The attorney acting for the judgment creditor must ensure that the return of service, before filing with the registrar, reflects that the documents on which the judgment creditor relies were attached to the process which was served and that the return of service reflects this fact.

4. A certificate of balance may be handed in at the hearing.



5. Order: if para 1.7.1 is not complied with:

5.1 The application herein may be served at the respondent's place of employment, and, only if a return of non-service is rendered in respect of such service, upon the respondent's residential address on a Saturday upon a person not less than 16 years of age.

5.2 The costs are costs in the cause.

6. If there is a failure to comply with the provisions of s 129 of the NCA, the following order pursuant to s 130(4) (b) of the NCA may be issued:

Order:

6.1. The application is postponed sine die.

6.2. In terms of section 130(4) (b) of the National Credit Act ('the NCA'), the order set out in paragraph 6.3 below is made.

6.3. Prior to re-enrolling the application, the applicant must serve on the respondent by Sheriff in terms of Rule 4 of the Uniform Rules of Court the following documents, subject to the proviso that if service is effected at the *domicilium* address then such service must be on a person as provided for in the Rules:

6.3.1 A revised section 129 notice in terms of the NCA ('the 129 notice') in which the current arrears are stated and distinguished from the previous 129 notice appearing as an Annexure in the application by a heading stating that the notice is a revised notice reflecting the respondent's current arrears;

6.3.2 A copy of the application together with all of the annexures;

6.3.3 A notice of re-enrolment which must state:

6.3.3.1 that the application which was set down for hearing on (date) was postponed sine die by the court;

6.3.3.2 the respondent's rights in terms of the NCA, and in particular those contemplated in section 129(1) (a) of the NCA, are unaffected by the fact that the application has already been instituted and a further note that the respondent is invited to respond to the revised notice within ten days of service of the documents referred to herein on the respondent;

6.3.3.3 the respondent is given ten days from the date of service of those documents referred to above, to explore those non-litigious ways of purging the respondent's default as set out in the revised section 129 notice;

6.3.3.4 in the event of the respondent failing to respond to the revised section 129 notice within ten days of service of those documents referred to above on the respondent, then application will be made for an order in terms of the notice of motion which appears in the application which was set down for hearing on (date);

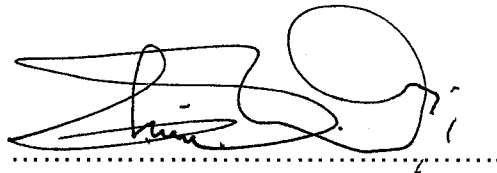
6.4. In the circumstances set out in paragraph 6.3 above, application will be made to the Court on (a specified date which date must

be more than ten days from date of service of the documents set out above, on the respondent).

6.5. The Sheriff in his return of service must specifically state that the revised section 129 notice was served on the respondent together with the notice of re-enrollment and the application.

6.6. Costs of the postponement are to be costs in the cause.

7. Two draft orders must be attached to the notice of set down.



P M MOJAPELO  
DEPUTY JUDGE PRESIDENT  
SOUTH GAUTENG HIGH COURT

Issued on 15 April 2013

---

<sup>i</sup> Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264 (SCA) para 27

<sup>ii</sup> Nedbank Ltd v Jessa and Another 2012 (6) SA 166 (CC) para 12

<sup>iii</sup> Standard Bank v Dawood 2012 (6) SA 151 (WCC) para 37

<sup>iv</sup> Nedbank Ltd v Mortinson 2005 (6) SA 462 (W) para 33.1

<sup>v</sup> Firststrand Bank of South Africa Ltd v Folscher and Another 2011 (4) SA 314 (GNP) at p 315E  
– 316B





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

Case No.: 123456

In the matter between:

BANK

Applicant

And

CONSUMER

Respondent

---

**AFFIDAVIT PURSUANT TO CHAPTER 10.17 OF THE PRACTICE MANUAL**  
*(PRO FORMA)*

---

I, the undersigned,

ATTORNEY

do hereby make oath and say that:

- A. I am an adult attorney, duly admitted as such, and practicing as such in partnership under the name and style of XYZ Attorneys of Address. I am the attorney of record for the Applicant in this matter.

- B. The facts herein contained are within my own personal knowledge and belief and are true and correct.
- C. I have perused the court file under the above case number wherein the applicant seeks, *inter alia*, execution where the property appears to be the primary home of the respondent.

Compliance with Chapter 10.15 of the Practice Manual of the South Gauteng High Court

1. As per Chapter 10.15 of the Practice Manual of the South Gauteng High Court I confirm the following:
- 1.1.1. I am satisfied that a proper cause of action has been disclosed and that there is not a mere reliance on a security instrument as is evidenced from page\_\_\_para\_\_\_ (or pages...where the agreement of loan (and other documents appear));
  - 1.1.2. I am satisfied that there is compliance with Rule 18(6) as appears at page\_\_\_para \_\_\_; alternatively,
  - 1.1.3. I am satisfied that sufficient facts have been disclosed and set out for a proper cause of action as appears at page\_\_\_para \_\_\_;
- 1.2. I have inspected the original documents pertaining to the matter as well as the security documents on which the matter is based and the copies attached to the summons or application, are true copies of the originals. Alternatively,
- 1.3. An affidavit from the judgment creditor has been filed setting out the whereabouts of the original documents, which affidavit also sets out the grounds of the deponent's belief that the documents attached are indeed copies of the originals as appears at page\_\_\_para \_\_\_. (Delete paragraph if 1.2 is applicable).

1.4. I am satisfied that the application or summons contains the statements referred to in *Saunderson, Jessa and Dawood*:

1.4.1. 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. This appears at page\_\_para\_\_;

1.4.2. The judgment debtor has been advised that he (or she) is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1), before the Court hearing the matter. This appears at page\_\_para\_\_;

1.4.3. The judgment debtor has been advised that in terms of Rule 46 (1)(c)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall be issued against his or her primary residence (home), unless a court having considered all the relevant circumstances, orders execution against such property. This appears at page\_\_para\_\_;

1.4.4. The judgment debtor has been advised that if he or she objects to his or her home being declared executable, he or she are called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46 (1)(a)(ii) of the Rules of Court and that a failure to do so may result in an order declaring his/her home specially executable, consequent upon which his/her home may be sold in execution. This appears at page\_\_para\_\_.

1.5. An affidavit pursuant to *Mortinson* has been filed and it contains the following averments:

1.5.1. The amount of the arrears outstanding at the date of the application for default judgment. This appears at page\_\_para\_\_;

- 1.5.2. Whether the immovable property which is sought to have declared executable was acquired by means or with the assistance of a State subsidy. This appears at page\_\_para \_\_\_\_;
  - 1.5.3. Whether, to the knowledge of the creditor, the immovable property is occupied or not. This appears at page\_\_para \_\_\_\_;
  - 1.5.4. Whether the immovable property is utilised for residential purposes or commercial purposes. This appears at page\_\_para \_\_\_\_;
  - 1.5.5. Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not. This appears at page\_\_para \_\_\_\_.
- 1.6. I am satisfied that in accordance with *Folscher*, the averments that may be taken into consideration by the court, when deciding whether a writ should issue or not, are present:
- 1.6.1. whether the mortgaged property is the debtor's primary residence, appears at page\_\_para \_\_\_\_;
  - 1.6.2. the circumstances under which the debt was incurred appears at page\_\_para \_\_\_\_;
  - 1.6.3. the arrears outstanding under the bond when the latter was called up, appears at page\_\_para \_\_\_\_;
  - 1.6.4. the total amount owing in respect of which execution is sought appears at page\_\_para \_\_\_\_;
  - 1.6.5. the debtor's payment history as appears at page\_\_para \_\_\_\_;
  - 1.6.6. the relative financial strengths of the creditor and the debtor, appears at page\_\_para \_\_\_\_;
  - 1.6.7. whether any possibility exists that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence, appears at page\_\_para \_\_\_\_;
  - 1.6.8. the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the

debtor would suffer if execution went ahead with a consequent loss of his home, appears at page\_\_para \_\_;

- 1.6.9. a notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action, and it appears at page\_\_para \_\_;
- 1.6.10. the debtor's reaction to such notice, if any, appears at page\_\_para \_\_;
- 1.6.11. the period of time that elapsed between receipt of such notice and the institution of action appears at page\_\_para \_\_;
- 1.6.12. whether the property is in fact occupied by the debtor, appears at page\_\_para \_\_;
- 1.6.13. whether the debtor will lose access to housing as a result of execution being levied against his home, appears at page\_\_para \_\_;
- 1.6.14. whether there is any indication that the creditor has instituted action with an ulterior motive or not, appears at page\_\_para \_\_;
- 1.6.15. the position of the debtor's dependants and other occupants of the house appears at page\_\_para \_\_.

### Service of the Process

- 1.7.1 The process was served personally as appears at page\_\_para\_\_; or
  - 1.7.2 Service was effected, as appears at page\_\_para\_\_ as authorised by the court as appears at page\_\_para\_\_.
- 1.8. The action is founded on an agreement within the meaning of the National Credit Act 34 of 2005 and the allegation concerning, the manner of delivery, from those set out in s 65(2), which the consumer has chosen for notices having been made at page\_\_para\_\_ and the notice was delivered in that manner, appears at page\_\_para\_\_;

(If the Consumer has chosen for the notice to be posted – Section 129(1)  
Notice)

- 1.8.1. The allegation that the compulsory notice pursuant to s 129(1) was delivered to the relevant post office and the post office would, in the normal course, have secured delivery of the registered item notification slip, informing the consumer that a registered article was available for collection, appears at page\_\_para\_\_;
- 1.8.2. The allegation that the post-despatch 'track and trace' printout from the website of the South African Post Office is attached indicating delivery at the consumer's post office appears at page\_\_para\_\_; or
- 1.8.3. The post office reflected on the 'track and trace' report, to which the s 129 notice was sent, is not the same as the post office or town name to which the s 129 notice was sent, but there is proof that the post office reflected on this 'track and trace' report, services the address of the consumer, which appears at page\_\_para\_\_;
- 1.8.4. The allegation that a minimum period of 10 business days of giving the statutory notice has elapsed before commencement of these legal proceedings and how this period is calculated, having regard to the delivery and service of the process, appears at page\_\_para\_\_.
- 1.8.5. Alternatively to 1.8.1-1.8.4. The Consumer applied for debt review but notice of termination of the debt review was given to the consumer, the debt counsellor and the National Credit Regulator at least 10 business days after the consumer applied for debt review which appears at page\_\_para\_\_;
- 1.9 The return of service reflects that the documents on which the judgment creditor relies, were attached to the process which was served and appears at page\_\_para\_\_.

1.10 Clause\_\_\_in the agreement, provides for a costs order other than a party and party costs order or any other justification for a costs order other than a party and party costs order appears at page\_\_\_para \_\_\_.

**WHEREFORE** I pray that it may please this Honourable Court to grant an order in terms of the draft attached to the notice of set down marked '**Draft Order**'.

---

DEPONENT

**SIGNED** and **SWORN TO** before me, at \_\_\_\_\_ on this \_\_\_\_\_ day of 201\_, by the Deponent who has acknowledged that he knows and understands the contents of this Affidavit and he has declared that he has no objection to taking the oath, and he regards the oath as binding on his conscience and he has uttered the following words: - "I swear that the contents of this Affidavit are true, so help me God."

---

COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

CAPACITY:

**EXPLANATORY NOTES TO THE PRACTICE DIRECTIVE on  
FORECLOSURE (Not forming part of the directive)**

**New Chapter 10.17 of the Practice Manual of SGHC**

**Foreclosure (and execution when property is, or appears to be, the defendant's primary home).**

**This chapter is applicable to all applications for foreclosure. (The word 'defendant' includes the word 'respondent' and vice versa. The word 'debtor' includes the word 'consumer' and refers to a 'judgment debtor').**

The directives that follow are based on the judgments in the following matters:  
Hand<sup>1</sup> and Swissborough<sup>2</sup>, Gordon<sup>3</sup>, Studdard<sup>4</sup>, Janse van Rensburg<sup>5</sup>,  
Bekker<sup>6</sup>, Wilkinson<sup>7</sup>, Sauderson<sup>8</sup>, Jessa<sup>9</sup>, Dawood<sup>10</sup>, Mortinson<sup>11</sup>,  
Folscher<sup>12</sup>, Sebola<sup>13</sup>, Petersen<sup>14</sup>, Ntsane<sup>15</sup>, Maleke<sup>16</sup>,  
Powell<sup>17</sup>, Rossouw<sup>18</sup>, Brown<sup>19</sup>, Mkhize<sup>20</sup>, Van Vuuren<sup>21</sup>, Balkind<sup>22</sup>,

---

<sup>1</sup> Standard Bank of South Africa Ltd v **Hand** 2012 (3) SA 319 GSJ para 5.

<sup>2</sup> **Swissborough** Diamond Mines v Government of the Republic of South Africa 1999 (2) SA 279 (T)

<sup>3</sup> Standard Bank of South Africa Ltd v **Gordon** an Others [2011] JOL 27838(GSJ)

<sup>4</sup> ABSA Bank Ltd v **Studdard** and Another [2012] JOL 28604 (GSJ)

<sup>5</sup> Absa Bank Ltd v **Janse van Rensburg** and Another, Absa Bank Ltd v Maree and Another (16071/12, 16815/12) [2012] ZAWCHC 238 (24 December 2012)

<sup>6</sup> Standard Bank of South Africa Ltd v **Bekker** and Another 2011 (6) SA 111 (WCC)

<sup>7</sup> Volkskas Bank Ltd v **Wilkinson** and Three Similar Cases 1992 (2) SA 388 (C)

<sup>8</sup> Standard Bank of South Africa Ltd v **Sauderson** and Others 2006 (2) SA 264 (SCA)

<sup>9</sup> Nedbank Ltd v **Jessa** and Another 2012 (6) SA 166 (CC)

<sup>10</sup> Standard Bank v **Dawood** 2012 (6) SA 151 (WCC)

<sup>11</sup> Nedbank Ltd v **Mortinson** 2005 (6) SA 462 (W)

<sup>12</sup> Firstrand Bank of South Africa Ltd v **Folscher** and Another 2011 (4) SA 314 (GNP)

<sup>13</sup> **Sebola** and Another v Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC)

<sup>14</sup> Absa Bank Ltd v **Petersen** 2013 (1) SA 481 (WCC)

<sup>15</sup> Absa Bank Ltd v **Ntsane** and Another 2007 (3) SA 554 (T)

<sup>16</sup> Firstrand Bank Ltd v **Maleke**; Firstrand Bank Ltd v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; Firstrand Bank Ltd v Mudlaudzi (637/2009, 638/09, 09/8830, 09/8941) [2009] ZAGPJHC 41; 2010 (1) SA 143 (GSJ) (20 August 2009)

<sup>17</sup> Firstrand Bank Ltd v **Powell**, Firstrand Bank Ltd v Nsele and Another, Firstrand Bank Ltd v Herbst and Another (2011/9130, 2011/20765, 2011/31969) [2012] ZAGPJHC 20 (6 March 2012)

<sup>18</sup> **Rossouw** and Another v Firstrand Bank Ltd 2010 (6) SA 439 (SCA)

<sup>19</sup> ABSA Bank Ltd v **Brown** and Another; ABSA Bank Ltd v Van Deventer and Another [2012] JOL 28445 (ECP)

<sup>20</sup> ABSA Bank Ltd v **Mkhize** and Another, ABSA Bank Ltd v Chetty, ABSA Bank Ltd v Mlipha (4084/2012, 4115/2012, 3882/2012) [2012] ZAKZDHC 38 (6 July 2012)

<sup>21</sup> Standard Bank of South Africa Ltd v **Van Vuuren** and Several Other Matters (32847/2012) [2013] ZAGPJHC 16 (26 February 2013)



Binneman<sup>23</sup>, Shaik<sup>24</sup>, Mokhonoana<sup>25</sup>, Owens<sup>26</sup>, Gundwana<sup>27</sup> and Jaftha<sup>28</sup>.

1. Without derogating from the requirements regarding applications contained in the Rules Regulating the Conduct of the Proceedings of the Several Provisional and Local Divisions of the High Court of South Africa ('Rule' or 'the Rules') or Chapter 9 of the Practice Manual of the South Gauteng High Court ('Practice Manual'), in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required in which the matters set out below in this para 1, are stated **(with proper references to indexed page numbers and paragraphs** – *Hand* para 5, *Swissborough* at 324F-G). The affidavit shall be attached to the Notice of Set down. The affidavit, a *pro forma* of which is attached, must contain the following:

- 1.1.1 That the deponent is satisfied that a proper cause of action has been disclosed and that there is not a mere reliance on a security instrument (*Gordon* para 9).

- 1.1.2 That there is compliance with Rule 18(6); alternatively,

- 1.1.3 Sufficient facts have been disclosed and set out for a proper cause of action to be made out (also when a simple summons is issued – *Studdard* para 25, *Janse van Rensburg* para 12) (*Bekker* para 29).

- 1.2 That he or she has inspected the original documents pertaining to the matter as well as the security documents on which the

---

<sup>22</sup> **Balkind** v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC and Others (29/2012) [2012] ZAECGHC 102 (12 December 2012)

<sup>23</sup> Nedbank Ltd v **Binneman** and 12 Similar cases [2012] ZAWCHC 141 (21 June 2012)

<sup>24</sup> Absa Bank Ltd v **Shaik** (09/8065) [2009] ZAGPH 58 (1 January 2009)

<sup>25</sup> Nedbank Limited v **Mokhonoana** 2010 (5) SA 551 (GNP)

<sup>26</sup> Firststrand Bank Limited t/a Honda Finance v **Owens** (16/2012) [2012] ZASCA 167 (23 November 2012)

<sup>27</sup> **Gundwana** v Steko Development and Others 2011 (3) SA 608 (CC)

<sup>28</sup> **Jaftha** v Schoeman and Others; van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

matter is based and that the copies, attached to the summons or application, are true copies of the originals. (*Studdard* para 6, *Wilkinson* at 397I - 398C.)

- 1.3 In the absence of 1.2 above that an affidavit from the judgment creditor setting out the whereabouts of the original documents, is attached, which affidavit must also set out the grounds of the deponent's belief that the documents attached are indeed true copies of the originals.
- 1.4 That the application or summons contains the statements referred to in *Saunderson* (para 27), *Jessa* (para 12) and *Dawood* (para 37).

(The statements read as follows: '*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.*') In addition, *Jessa* at para 12 requires the following amplification of *Saunderson* to include a notification to the defendant that: '*he (or she) is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution and rule 46(1), before the Court hearing the matter.*' (See also *Dawood* at para 37 which requires that the summons should contain a notice to the following effect, as suggested by Erasmus:

*[37] It is further directed, as a rule of practice in this Division in all matters issued subsequent to the date of this judgment, that the summons should contain a notice to the following effect, as suggested in Erasmus:*

*"Take notice that:*

- (a) *your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996,*

*which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before the court;*

- (b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances;*
- (c) in terms of rule 46(1)(a)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (ie your home), unless the court, having considered all the relevant circumstances, orders execution against such property;*
- (d) if you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)(a)(ii) of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, con-sequent upon which your home may be sold in execution.”)*

1.5 That an affidavit pursuant to *Mortinson* has been filed or the facts required to be disclosed have been disclosed. The *Mortinson* affidavit shall contain:

- 1.5.1 the amount of the arrears outstanding at the date of the application for default judgment;
- 1.5.2 whether the immovable property which is sought to have declared executable was acquired by means or with the assistance of a State subsidy;
- 1.5.3 whether, to the knowledge of the creditor, the immovable property is occupied or not.
- 1.5.4 whether the immovable property is utilised for residential purposes or commercial purposes;
- 1.5.5 whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

*(Mortinson para 33.1)*

1.6 That there is compliance with *Folscher*. *Folscher*, in addition to the *Mortinson* requirements, says at p315F – 316B: ‘...some of the following factors that may need to be taken into consideration by the court, when deciding whether a writ should issue or not, are:

1.6.1 whether the mortgaged property is the debtor's primary residence;

1.6.2 the circumstances under which the debt was incurred;

1.6.3 the arrears outstanding under the bond when the latter was called up; (See note below)

1.6.4 the total amount owing in respect of which execution is sought;

1.6.5 the debtor's payment history;

1.6.6 the relative financial strengths of the creditor and the debtor;

1.6.7 whether any possibilities exist that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;

1.6.8 the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;

1.6.9 whether any notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;

1.6.10 the debtor's reaction to such notice, if any;

1.6.11 the period of time that elapsed between delivery of such notice and the institution of action;

1.6.12 whether the property is in fact occupied by the debtor;

- 1.6.13 *whether the debtor will lose access to housing as a result of execution being levied against his home;*
- 1.6.14 *whether there is any indication that the creditor has instituted action with an ulterior motive or not;*
- 1.6.15 *the position of the debtor's dependants and other occupants of the house.*

*It is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact-bound to identify the criteria that are relevant for the particular case.'*

Note: When amounts are low, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of x months and that notice of set down should again be served. NB 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 seeking to make arrangements to bring the arrears up to date or purge the default. (*Sebola* para 46 and *Petersen* para 7. See *Ntsane*. Also see *Maleke*.)

- 1.7.1 That there was personal service of the process upon the consumer.
- 1.7.2 If personal service is not possible, that there was such service as was authorised by the court (*Powell* para 7.9). (See para 5 below.)
- 1.8 That if the action is founded on an agreement within the meaning of National Credit Act 34 of 2005, (NCA) it is to be confirmed that an allegation is contained in the summons, as to what manner of delivery, from those set out in s 65(2) of the NCA, the consumer has chosen for notices and that the notice

was delivered in that manner. (*Rossouw* at para 52-54. *Brown* para 22).

If the choice is to receive a notice 'by ordinary mail' such choice includes registered mail and must be read as registered mail (*Sebola* para 68 and 75). (NB the greater (registered mail) includes the lesser (ordinary mail) – see *Rossouw* para 57 and *Sebola* para 68.)

Note: Where a consumer fails to collect the s 129 notice and it is (repeatedly) returned to sender, service by sheriff of the s 129 notice would suffice as in the greater (service by sheriff) includes the lesser (registered post).

In the case where the consumer has chosen for the notice to be posted and there is no proof of actual receipt of the notice:

1.8.1 that an allegation is contained in the summons or particulars of claim (or application) that the compulsory notice (*Sebola* para 45) pursuant to section 129 (1) of the NCA ('the s 129 notice') was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of the registered item notification slip, informing the consumer that a registered article was available for collection (*Sebola* para 77);

1.8.2 that a post-despatch 'track and trace' print-out from the website of the South African Post Office is attached indicating delivery at the debtor's post office (*Sebola* para 76).

Note: *If such 'track and trace' notice indicates that the notice was returned to sender or that there is a positive indication that the notice did in fact not reach the*

*consumer, it may not constitute adequate proof of delivery of the notice as contemplated in Sebola. (Mkhize at para 55, 56 and 57, Van Vuuren para 6 and Balkind para 53 – contra Binneman para 8.)*

1.8.3 that, in the event of the post office reflected on the 'track and trace' report not being the same as the post office or town name to which the s 129 notice was sent, there is proof that the post office reflected on the 'track and trace' report services the address of the consumer to which the s 129 notice was sent. (*Van Vuuren* para 16.)

1.8.4 that a minimum period of 10 business days of giving of the statutory notice had elapsed before commencement of the legal proceedings and how the period is calculated having regard to the receipt of the notice and service of the process (*Shaik* paras 16 and 17; *Mokhonoana* para 13 – 15 (*Sebola* para 159).

1.8.5 ALTERNATIVELY to 1.8.1 - 1.8.4, that in the case of termination of a debt review pursuant to s 86(10) of the NCA, a notice pursuant to s 86(10) was given to the debtor, the debt counsellor and the National Credit Regulator at least 60 business days after the debtor applied for debt review. (In such case, notice in terms of s 129(1)(a) is not required - *Owens* para 11).

1.9 That the return of service complies with 3 below.

1.10 The clause number in any agreement which provides for a costs order other than a party and party costs order or any other justification for a costs order other than a party and party costs order.

2. If there is a failure to comply with the requirement for service set out in 1.7.1 above, an order in terms of 5 below will, on application, be issued (*Powell* para 7). (See Rule 4 (10).)
3. The attorney acting for the judgment creditor must ensure that the return of service, before filing with the registrar, reflects that the documents on which the judgment creditor relies were attached to the process which was served and that the return of service reflects this fact.
4. A certificate of balance may be handed in at the hearing (*Rossouw* para 48).
5. Order: (See *Powell*) if para 1.7.1 could not be complied with.
  - 5.1 The application herein may be served at the respondent's place of employment, and, only if a return of non-service is rendered in respect of such service, upon the respondent's residential address on a Saturday upon a person not less than 16 years of age.
  - 5.2 The costs are costs in the cause.
6. If there is a failure to comply with the provisions of s 129 of the NCA, the following order pursuant to s 130(4)(b) of the NCA may be issued: (see *Mkhize*)

Order

- 6.1. The application is postponed sine die.
- 6.2. In terms of section 130(4)(b) of the National Credit Act ('the NCA'), the order set out in paragraph 6.3 below is made.
- 6.3. Prior to re-enrolling the application, the applicant must serve on the respondent by Sheriff in terms of Rule 4 of the Uniform



Rules of Court the following documents, subject to the proviso that if service is effected at the *domicilium* address then such service must be on a person as provided for in the Rules:

6.3.1 A revised section 129 notice in terms of the NCA ('the 129 notice') in which the current arrears are stated and distinguished from the previous 129 notice appearing as an Annexure in the application by a heading stating that the notice is a revised notice reflecting the respondent's current arrears;

6.3.2 A copy of the application together with all of the annexures;

6.3.3 A notice of re-enrolment which must state:

6.3.3.1 that the application which was set down for hearing on (date) was postponed sine die by the court;

6.3.3.2 the respondent's rights in terms of the NCA, and in particular those contemplated in section 129(1)(a) of the NCA, are unaffected by the fact that the application has already been instituted and a further note that the respondent is invited to respond to the revised notice within ten days of service of the documents referred to herein on the respondent;

6.3.3.3 the respondent is given ten days from the date of service of those documents referred to above, to explore those non-litigious ways of purging the respondent's default as set out in the revised section 129 notice;

- 6.3.3.4 in the event of the respondent failing to respond to the revised section 129 notice within ten days of service of those documents referred to above on the respondent, then application will be made for an order in terms of the notice of motion which appears in the application which was set down for hearing on (date);
- 6.4. In the circumstances set out in paragraph 6.3 above, application will be made to the Court on (a specified date which date must be more than ten days from date of service of the documents set out above, on the respondent).
- 6.5. The Sheriff in his return of service must specifically state that the revised section 129 notice was served on the respondent together with the notice of re-enrollment and the application.
- 6.6. Costs of the postponement are to be costs in the cause.
7. Two draft orders must be attached to the notice of set down.

Issued on 15 April 2013

by Office of DJP

SOUTH GAUTENG HIGH COURT