

PRACTICE MANUAL – Explanatory Notes

Chapter 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. (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:

Hand¹ and Swissborough², Gordon³, Studdard⁴, Janse van Rensburg⁵, Bekker⁶, Wilkinson⁷, Saunderson⁸, Jessa⁹, Dawood¹⁰, Mortinson¹¹, Folscher¹², Sebola¹³, Petersen¹⁴, Ntsane¹⁵, Maleke¹⁶, Powell¹⁷, Rossouw¹⁸, Brown¹⁹, Mkhize²⁰, Van Vuuren²¹, Balkind²², Binneman²³, Shaik²⁴, Mokhonoana²⁵, Owens²⁶, Gundwana²⁷, Jaftha²⁸, Lekuku²⁹ and Mokweni³⁰.

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

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

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

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

⁵ 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)

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

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

⁸ Standard Bank of South Africa Ltd v **Saunderson** and Others 2006 (2) SA 264 (SCA)

⁹ Nedbank Ltd v **Jessa** and Another 2012 (6) SA 166 (CC)

¹⁰ Standard Bank v **Dawood** 2012 (6) SA 151 (WCC)

¹¹ Nedbank Ltd v **Mortinson** 2005 (6) SA 462 (W)

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

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

¹⁴ Absa Bank Ltd v **Petersen** 2013 (1) SA 481 (WCC)

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

¹⁶ 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)

¹⁷ 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)

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

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

²⁰ 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)

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

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

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

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

²⁵ Nedbank Limited v **Mokhonoana** 2010 (5) SA 551 (GNP)

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. A *PRO FORMA AFFIDAVIT DEALING WITH ALL THE REQUIREMENTS IS ATTACHED HERETO*. The affidavit shall be attached to the Notice of Set Down.
2. An order declaring property specially executable shall only be granted by the Court on notice to the defendant or respondent.
3. Where action proceedings have been instituted and the provisions of Rule 31(5) are applicable, the Registrar shall refer the application for the money judgment and the declaration that the property is executable, to open court.
4. Note: When arrears are low, and/or the period of non-payment is a few weeks/months, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of 6 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 seek 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* and *Lekuku*.) At the adjourned date, an affidavit should be filed, setting

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

²⁷ **Gundwana v Steko Development and Others** 2011 (3) SA 608 (CC)

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

²⁹ *Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014)

³⁰ *Standard Bank of South Africa Limited v Mokweni and another* (Case No 44125/2013)(17 March 2015)

out what efforts the Bank has made to effect settlement and/or prevent foreclosure.

5. Numbered flags should be attached to the relevant page dealing with each requirement set out in the affidavit (eg. Debtor's payment record will have flag 5.4)
6. A certificate of balance may be handed in at the hearing (*Rossouw* para 48).
7. 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:

- 7.1. The application is postponed sine die.
- 7.2. In terms of section 130(4)(b) of the National Credit Act ('the NCA'), the order set out in paragraph 3.3 below is made.
- 7.3. 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:
 - 7.3.1. 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;

7.3.2. A copy of the application together with all of the annexures;

7.3.3. A notice of re-enrolment which must state:

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

7.3.3.2. 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;

7.3.3.3. 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;

7.3.3.4. 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);

7.4. In the circumstances set out in paragraph 7.3 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).

7.5. 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-enrolment and the application.

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

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