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Judge President's practice directive in terms of section 14(1)(a) of the Superior Courts Act, Act 10 OF 2013

OFFICE OF THE JUDGE PRESIDENT
GAUTENG LOCAL DIVISION OF THE HIGH COURT OF SOUTH AFRICA
Private Bag X7, JOHANNESBURG 2000
Tel 011 335 0482 0151 — Fax 086 202 1291
Corner Pritchard & Von Brandis Streets, Fifth Floor, Johannesburg
NWalkinshaw@judiciary.org.za

Date: 02 May 2018

In re: The matters of:

1. ABSA BANK LIMITED // D K MOKEBE (CASE NO: 2018/00612)
2. ABSA BANK. LIMITED // R L KOBE (CASE NO: 2017/48091)
3. ABSA BANK LIMITED // M N VOKWAN (CASE NO: 2018/1459)
4. STANDARD BANK OF SOUTH AFRICA LIMITED // S COLOMBRICK & ANOTHER (CASE NO: 2017/35579)

JUDGE PRESIDENT'S PRACTICE DIRECTIVE IN TERMS OF SECTION 14(1)(a) OF THE SUPERIOR COURTS ACT, ACT 10 OF 2013

1. This is a Directive issued in terms of Section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, read with Section 173 of The Constitution of the Republic of South Africa. The purpose of the Directive is to make provision for the constitution of a full Court, to sit at first instance to hear and determine the matters referred to a Full Court, including the issues identified hereunder. The further purpose of the Directive is, inter alia, to set timelines for the filing and service of further process regarding the issues outlined hereunder.

Background

2. On Friday, 13 April 2018, four unopposed applications relating to foreclosures of bonds over primary residences where the provisions of The National Credit Act 34 of 2005 ("NCA") were applicable, were referred for hearing by the Full Court pursuant to s.14(1)(b) of the Superior Courts Act. The reason why this was done appears from the written judgment of that date in the first four matters identified in the heading of this directive.
3. It has been the practice in the Local Division, having regard to s.26(3) of the Constitution, that when a mortgagee applies for a default money judgment for the accelerated full outstanding balance of the bond and an order declaring the residence executable, to postpone the application for some months to enable the debtor to bring up the arrears. If upon the postponed date the arrears will have been brought up, the agreement would be reinstated (s.129(3) of NCA) and the debtor will not lose her home.
4. However, some mortgagees began applying, when the court postponed the application to declare the residence executable, for an immediate money default judgment for the accelerated full outstanding balance. Judges have also reported

that some mortgagees would then, based on that default money judgment, take out a writ against movables and execute by attachment of movables and their subsequent sale in execution. The proceeds of the sale in execution would then be credited to the mortgagor's bond account with the mortgagee.

5. It was in this regard that divergent practices have developed, some of which were reported in judgments, and others simply applied without written judgments being handed down. This has led to the disharmony more fully raised in the Mokebe-judgment that has referred this issue to the full court. See FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another [2014] ZAGPJHC 117 (4 June 2014); Absa Bank Ltd v Lekulu, [2014] ZAGPJHC 244 (14 October 2014) (full court); FirstRand Bank Limited t/a First National Bank v Zwane; FirstRand Bank Limited t/a First National Bank v Hyslop and Another, Nedbank Limited v Nkuna and Another (18581/2016, 19362/2016, 30634/2015) [2016] ZAGPJHC 203; 2016 (6) SA 400 (GJ) (29 July 2016); Absa Bank Ltd v Njolomba, RC and Another, Case no. 20321/2017 (5 March 2018).

The Legal Issues raised:

6. The following issues have been raised in judgments, and there may be others, concerning the legal propriety and desirability of granting a money judgment for the accelerated full outstanding balance under the bond, and yet then postponing the application to declare the property secured by the bond specially executable:
   (a) Does a court have a discretion, when postponing an application for executability to afford the mortgagor an opportunity to " … remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue …" under the NCA, and the mortgagee asks for an immediate money judgment for the accelerated full outstanding balance under the bond, to decline that request and postpone it too so that it too is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?
   (b) If the court does have such a discretion, meaning that the court may in its discretion decline immediately to grant a default money judgment for the accelerated full outstanding balance, should the Practice Manual request uniformity of treatment, meaning uniformity of manner of exercise of discretion, by the judges in this Division?
   (c) If so, what should that uniformity of treatment be? In particular, is the current suggested manner of dealing with the issue, as stated in the latest version of the Practice Manual, being the postponement of the application for the money judgment as well, objectionable/desirable?
   (d) Does such an immediate money judgment for the accelerated full balance qualify as "*any other court order enforcing that agreement"* for purposes of s.129 (3) and (4) of the NCA? If it does so qualify, does it have the consequence of prohibiting the credit provider from re-instating or reviving the credit agreement — ?despite the arrears having been paid up — once the mortgagee bank, on the strength of such a judgment for the accelerated full balance, will have attached and sold in execution movable property of the mortgagor?

   (e) Even if such a judgment could be given on the basis that it would be capable of subsequently being set aside or declared null and

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void if the mortgagor does "… *remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue* …", is it desirable that the court makes such an order, given —

(i) its potential for attachment and execution of movables in the meantime? and

(ii) that it may be undesirable to make an order which is not final in that it may potentially be set aside/declared null and void later?

7. The Full Court will also be required to consider under what circumstances should a court set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.

Directive

8. Therefore, in anticipation of the constitution of a Full Court under s.14(1)(a) of the Superior Court Act for purposes of hearing and disposing of the matters referred to it, including the legal issues identified above, the Judge President hereby directs the Chief Registrar to:
   a. Cause this Directive to be issued out of the office of the Chief Registrar for placement on the Court notice board in the Court foyer in accordance with Rule 16A(1)(c).
   b. Serve copies of this Directive on:
      i. The Minister of Trade and Industry;
      ii. The National Credit Regulator;
      iii. The South African Human Rights Commission;
      iv. The Law Society of South Africa;
      v. The General Council of the Bar of South Africa;
      vi. The South African Reserve Bank; and
      vii. SA Home Loans.
9. Service of this Directive shall farther be effected as follows:
   a. On the Minister of Trade and Industry:
      i. By service on the State Attorney, Pretoria.
      ii. By e-mail to the Minister.
   b. On the National Regulator, the South African Human Rights Commission, the Law Society of South Africa, The General Council of the Bar of South Africa, The South African Reserve Bank and SA Home Loans: by e-mail
10. Within 10 (ten) days of the publication of the directive as provided for in paragraph 8 above, any interested party who wishes to be admitted as *amicus curiae* must request consent from the existing applicants (the mortgagee banks) to be admitted as such upon such terms and conditions as may be agreed upon in writing by the parties.
11. If the written consent referred to in paragraph 10 is obtained, Rules 16A(3) and (4) will apply.
12. If consent is not obtained, any interested party who wishes to be admitted as *amicus curiae* must, within 5 (five) days of the expiry of the 10 (ten) day period provided for in paragraph 10 above, apply to the court to be admitted as *amicus*

curiae in the proceedings, which application must comply with the provisions of Rule 16A(6)(a), (b) and (c).

13. Any party to the proceedings who wishes to oppose any application to be admitted as *amicus curiae* must comply with Rule 16A(7).
14. Rule 16A(8) shall apply to any application to be admitted as *amicus curiae*.
15. The applicants (the mortgagee banks) must deliver their supplementary affidavits by whichever of the following times at the latest:
   a. within 10 (ten) days after the last date of admission of any interested party as an *amicus curia,* whether by consent or by order of Court;
   b. within 10 (ten) days after a third party is refused leave to intervene as an *amicus curia* by the Court; or
   c. if no third party seeks to intervene as an *amicus curiae*, within 10 (ten) days after the expiry of the period of 10 (ten) days referred to in paragraph 10 above.
16. Within 10 (ten) days of the filing of the supplementary affidavits or of the expiry of the period provided for in paragraph 15 for the delivery of the applicants' supplementary affidavits, the *amici curiae* must file their answering affidavits, if any.
17. Within 5 (five) days of the delivery of the answering affidavits by the *amici curiae* or of the expiry of the time period for the filing of the answering affidavits, the applicants (the mortgagee banks) must deliver their replying affidavits, if any.
18. Thereafter, the further conduct of the matter shall be case-managed by the Judge President and/or the Deputy Judge President, or any other Judge so designated by the Judge President. The case management shall include directions on the indexing and pagination of the papers, the parties responsible therefor and the filing of heads of argument.

(Signed)

D Mlambo

Judge President of the Gauteng Division of the High Court of South Africa

3 *Author's note:* The Practice Directive is reproduced here without editorial intervention.

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