

IN THE HIGH COURT OF SOUTH AFRICA  
/RB

(TRANSVAAL PROVINCIAL  
DIVISION)

DATE:  
CASE NO.  
35124/05

In the matter  
between

NEDBANK  
LIMITED

an  
d

WILLIAM MASHIYA

LENAH BICHI MASHIYA

PLAINTIF  
F

1ST  
RESPONDENT  
2ND RESPONDENT

ERRATUM:

Mortinson's case has been reported: *Nedbank (Ltd) v*  
*Mortinson 2005(6) SA 462 W*

E BERTELSMANN  
JUDGE OF THE HIGH  
COURT

IN THE HIGH COURT OF SOUTH AFRICA  
/RB

(TRANSVAAL PROVINCIAL

DIVISION)

REPORTABLE

DATE: 31/3/06

CASE NO: 35124/05

In the matter  
between

NEDBANK LIMITED

PLAINTIFF

and

WILLIAM MASHIYA

1ST RESPONDENT

LENAH BICHI MASHIYA

2ND RESPONDENT

JUDGMENT

BERTELSMANN J

THE  
PARTIES

1. The plaintiff is Nedbank Limited, a duly registered bank, a public company, incorporated with limited liability in accordance with the banking and company laws of the Republic of South Africa. It acts in these proceedings as the successor in title of certain of the assets and liabilities of Peoples Bank Limited (formerly known as FBC Fidelity

Bank Limited). The plaintiff has its registered office at  
 135 Rivonia  
 Road, Sandown,  
 Gauteng.

2. The first defendant and the second defendant are described as follows in the summons

" **Willy Mashiya and Lenah Bichi Mashiya** jointly and severally the one paying the other to be absolved whose full and further particulars are to the plaintiff unknown of **ERF 1366 PHOLA**, being the chosen *domicilium citandi et executandi* for the purposes of this action at that address also known as erf No 1366 Mandela Village, Phola."

3. The defendants are, as it appears from mortgage bond BL 54369/90, annexed to the summons, married in community of property.

### **THE BOND AND THE IMMOVABLE PROPERTY BONDED**

4. The abovementioned bond was obviously taken out to enable the defendants to purchase the property known as Erf 1366 Phola Township Registration Division J.S. Transvaal; held by Certificate of Registered Grant of Leasehold TL 49078/90 and registered in the defendants' name.

## THE CAUSE OF ACTION

5. According to the summons the defendants borrowed money from the plaintiff's predecessor in title. They have fallen in arrears with payment of the instalments of the sum that was lent and advanced to them and secured by the mortgage bond over the property.
  
6. Payment of the sum of R17 379.10 as per certificate of balance (for which mortgage bond makes the provision) is claimed, together with interest and an order declaring the said property executable. The prayer for this order is phrased as follows in the summons
 

"An order declaring the said property executable for the said sums as contemplates (sic) by the provisions of Section 26(3) of the Constitution of the Republic of South Africa, Act (sic!) 108 of 1996, the facts relied upon by the Plaintiff, which facts appear from prayer 1 above, entitling the Plaintiff to the order sought;"

## THE RETURN OF SERVICE

7. The summons was served on the 08 November 2005 at erf 1366 Phola,

No 1366 Mandela Village, Phola, Witbank. It was affixed to the principal door of the residence.

8. This is the *domicilium citandi et executandi* chosen in terms of the

mortgage bond.

9. Mindful of the decision of the Constitutional Court in *Jaftha v*

*Schoeman & Others; Van Rooyen v Stoltz & Others* 2005(2) SA 140

(CC), and the judgment of the full bench of the

Witwatersrand Local

Division in Case no 4183/05 of *Nedbank Limited v Debbie-Ann*

*Mortinson*, (not yet reported), the return describes the property at which

the service was effected in the following terms;

"RESIDENTIAL IMPROVEMENTS:

1 X TILE ROOF

PLASTERED WALLS

3 X BEDROOMS

1 X BATHROOM

1 X KITCHEN

1 X LOUNGE

1 X GARAGE

WIRE  
FENCE"

10. The above-quoted judgments emphasise the care that has to be taken in declaring a residential property executable. **In** the *Jaftha*, the Constitutional Court established the principle that a system that permits execution against immovable property is a limitation of the right to housing enshrined in Section 26 of the Constitution, particularly if such execution is levied without judicial sanction. The *Jaftha* judgment was given against the background of the fact that judgment creditors for very moderate amounts attempted to execute against the residential property of persons who were manifestly poor.

11. **In** the *Jaftha* judgment, it was held that the execution against immovable property must be subject to judicial oversight to ensure that access to housing is not lost if the debt can be liquidated or is "trifling in amount and significance to the judgment creditor" (paragraph [57]).

12. The *Mortinson* judgment underlines the fact that "The smaller the amount claimed the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable." (paragraph [24])

13. In paragraph 33 of this judgment, Joffe J, speaking on behalf of the unanimous court, states the following in regard to the circumstances under which a court may grant judgment declaring the property executable that was hypothecated to secure a loan:

"[33] Regard being had to all of the foregoing it appears that where the debtor specifically hypothecated his or her immovable property and there is no abuse of the court procedure, the limitation is reasonable and justifiable as contemplated in section 36(1) of the Constitution. What is required are rules of practice to alert the Registrar and assist him or her in determining abuses and referring those applications for consideration by the court. To this end the following rules of practice are laid down in this court:

33.1 In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

33.1.1 The amount of the arrears outstanding as at the date of the application for default judgment:

33.1.2 Whether the immovable property which is sought to have declared executable was acquired by means of or with the assistance of a state subsidy.

33.1.3 Whether to the knowledge of the creditor the immovable property is occupied or not.

33.1.4 Whether the immovable property is utilised for residential purposes or commercial purposes.

33.1.5 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.

33.2 All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable where the amount claimed falls within the jurisdiction of the Magistrate's Court shall be referred by the Registrar for consideration by the court in terms of rule 31(5)(b)(vi)

34. A further rule of practice is laid down that a warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring the immovable property executable, shall contain a note advising a debtor of the provisions of rule 31(5)(d)."

14. Rule 31(5)(b)(vi) determines that an application for default judgment may be referred by the Registrar to the open court for adjudication. **In all** other cases, the Registrar could grant default judgment himself or herself. This power is now curtailed by the **Mortinson** judgment.

**THE APPLICATION FOR DEFAULT  
JUDGMENT**

15. The present application is one that falls within the parameters of rule 31(5)(b)(vi)

16. It is an application for judgment by default.

17 The application clearly intends to follow the ***Mortinson*** judgment.

18. When the matter was called before me, unfortunately almost two months ago, I raised certain problems that presented themselves in respect of the manner and fashion in which the plaintiff (the same as in the ***Mortinson*** judgment) had placed the information before the court that the ***Mortinson*** judgment has determined should be recorded before a default judgment may be entered in matters falling in this category.

19 I requested Mr Coetsee, who appeared on behalf of the plaintiff / applicant, to prepare heads of argument in two of the matters in which his client, the present plaintiff, was involved.

20. I am indebted to Mr Coetsee for the very helpful heads which he filed and I regret it has not been possible to finalize this judgment at an earlier stage.

**THE AMOUNT OF THE ARREARS OUTSTANDING AS AT THE DATE OF THE APPLICATION FOR DEFAULT JUDGMENT and THE OFFICE OF PLAINTIFF'S DEPONENT**

21. This amount must, in accordance with the ***Mortinson*** judgment, be determined by an affidavit, filed simultaneously with the application for default judgment.
22. In *casu*, the plaintiff has filed an affidavit by one Jaysheela Naidoo, who describes herself as follows:
- "I am an adult female team leader of the plaintiff and the facts contained fall within my personal knowledge and I am duly authorised to make this affidavit."( sic)
23. It will be immediately apparent that the description of the office that the deponent holds in the plaintiff organisation, namely "team leader", is vague in the extreme.

24 It is obvious that the information that must be placed  
· before the court in  
the affidavit must be  
reliable.

25 The affidavit must be sworn to by a deponent who can  
· show  
convincingly that she or he has actual knowledge of the  
sum that is  
outstanding on the  
mortgage bond.

26 The evidence of the debtors' arrears will appear from  
· the Plaintiffs  
books. As such, it falls within the parameters of  
section 28 of the  
Civil Proceedings Evidence Act, 25 of 1965. This  
section reads as  
follows

;

**" 28.Entries in bankers' books admissible in certain**

cases. - The entries in ledgers, day-books, cash-  
books and  
other account books of any bank, shall be  
admissible as  
*prima facie* evidence of the matters,  
transactions and  
accounts therein recorded, on proof being  
given by  
affidavit in writing of a director, manager or  
officer of  
such bank, or by other evidence, that such  
ledgers, day  
books, cash-books or other account books are  
or have been  
the ordinary books of such bank, and that the  
said entries  
have been made in the usual and ordinary  
course of  
business, and that such books are in or come  
immediately  
from the custody or control of  
such bank."

- 27 Although it is obviously not necessary to comply with the provisions of section 30 of the same Act, as this is a judgment by default, it is clear that, in order to ensure that the information that is required before a default judgment can be granted emanates from a reliable source, the office of the deponent must be described with full particularity.
- 28 The word "team leader" tends to obscure rather than to illuminate the office that the deponent occupies. It does not indicate the daily tasks and functions that the deponent fulfils in the service of the plaintiff. It is consequently unclear in which manner and fashion the knowledge of the arrears that existed at the time of filing of the application for default judgment was gained by the deponent. It is not clear whether she deals with arrears of borrowers and whether it is her task to establish the exact amount thereof as part of her job description. She also fails to state whether she has access to the books of the plaintiff or not.
- 29 Before a court declares a residential dwelling executable, it must be certain that the cause of action has been fully and properly established.
- 30 The description of the deponent must consequently be supplemented.

31. The amount of the arrears outstanding must furthermore be established from a reliable source.

32 The deponent deals as follows with the required information  
 "The total arrears due by the Defendant (sic) to the Plaintiff amount to R5 452.26 and the last payment was made to the plaintiff on or about the 23 March 2004."

33. The deponent should indicate from which source, ie a computer record, a book entry or a similar record this figure was extracted for the reasons set out above.

**WHETHER THE IMMOVABLE PROPERTY WAS ACQUIRED BY MEANS OF OR WITH THE ASSISTANCE OF A STATE SUBSIDY.**

34. Again, the deponent merely records that this property was not acquired by means of a state subsidy.

35. She should at least have added that the records kept by the plaintiff indicate, in the course of the ordinary everyday book keeping of the bank, whether residential properties the acquisition of which is financed by the bank are acquired with a state subsidy or not. She must confirm that she has consulted those records and must indicate that they are reliable because of

the fact they form part and parcel of regular entries in the books or electronic records of the plaintiff.

**WHETHER THE IMMOVABLE PROPERTY IS  
OCCUPIED  
OR  
NOT**

- 36     The deponent states that "To the best of my knowledge  
·     and from the information available from the Plaintiff the aforementioned immovable property is currently occupied by the defendant/s" (sic).
- 37     This assertion falls short of required standard of  
·     reliability. The deponent ought to indicate the source of her information and the reliability of such source.
- 38     These comments also hold good for the description of the  
·     immovable property as being utilised for residential purposes and not for commercial purposes.
- 39     Similarly, the assertion that the debt was incurred for the  
·     acquisition of the property must be based upon the information that is available in the books and records of the plaintiff, and the deponent must confirm that she has consulted these entries.

40     One Zelda Jonck has filed a further affidavit. She is the  
·     secretary of the  
     attorney acting on behalf of the  
     plaintiff.

41     She asserts the following in her  
·     affidavit  
     "From the enquiries conducted personally by me  
     with the  
     Witbank (sic), I have ascertained that the physical  
     address of W  
     Mashiya and L B Mashiya are: (sic) 1366 Mandela  
     Village,  
     Phola.  
     "

42     This is clearly hearsay  
·     evidence.

43     In order to enable the court to assess the reliability of  
·     this information  
     the deponent should at the very least describe the  
     department and the  
     official from whom she received the information she  
     relates to the court  
     in       this  
     fashion.

**THE       CERTIFICATE       OF  
BALANCE**

44     The mortgage bond contains a clause that entitles the  
·     plaintiff to file a  
     certificate of indebtedness  
     which

"certificate shall upon the mere production thereof be that I have indicated above, I am not convinced that the spirit of the the Mortgagor and be *prima facie* proof of the Constitution and import of the judgments referred to above would and of the fact that such amount is due properly be served by allowing a residential property to be declared

45 and has not been must purport to have been signed by a  
 . established as emanating from  
 . Manager or Accountant for the time being of any branch or the Head Office of the bank.

5 "The right to housing, and the protection against  
 1 unwarranted eviction, is not to be trifled with.

46 While it is not necessary to prove the capacity and the  
 . authority of the said Manager or Accountant, his name must certainly be  
 52 Under the circumstances, the application for default  
 . disclosed in judgment is postponed *sine die* to enable the plaintiff to supplement its papers in the respect that I have held them to be

47 deficient. In the present instance the person who signed the  
 . certificate of balance I described type- letter as "Manager-  
 32. In make no order as to s Mortgage  
 . costs Foreclosures  
 " .

48 A signature that appears to be original, but is totally  
 . illegible and indecipherable, is affixed to the space over this  
 description. E BERTELSMANN

JUDGE OF THE HIGH  
COURT

35124.  
 49 The identity of the person signing that certificate  
 . should be disclosed.

HEARD ON:  
10/02/2006

50 Although Mr Coetsee has striven valiantly to persuade  
 FOR THE PLAINTIFF: ADV SE that the  
 COETSEE that the  
 INSTRUCTED BY: MESSRS FINDLAY & NIEMEYER INC of  
 PARTICULARITY  
 60

NO APPEARANCE FOR THE  
DEFENDANTS