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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



CASE NO: 21247/2018

In the matter between:

NATIONAL URBAN RECONSTRUCTION & HOUSING AGENCY NPC Applicant

and

MORULA RESOURCES CC First Respondent

TSHIRELETSO HAROLD DIRA Second Respondent

CITY OF JOHANNESBURG MUNICIPALITY Third Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introductory background

1. The applicant, as judgment creditor, seeks an order authorising execution against two immovable properties owned by the first respondent (judgment debtor) in

satisfaction of a judgment debt. One of the properties sought to be declared specially executable is allegedly occupied by the second respondent, who maintains that it is his primary residence. The other property is vacant.

2. The applicant loaned monies to the first respondent, a juristic entity, in terms of a commercial loan transaction. The second respondent stood surety for the first respondent's indebtedness arising from the latter's obligations under a loan agreement concluded with the applicant. When the first respondent defaulted on its obligations under the loan agreement, the applicant instituted action against the first respondent (principal debtor) and the second respondent (surety) for the recovery of the first respondent's indebtedness then owing to it. On 25 June 2019, summary judgment was granted against the first and second respondents, jointly and severally, the one paying, the other to be absolved, for payment of the sum of R4,599 929.51 together with interest and costs on the scale as between attorney and client (the judgment debt).

3. The applicant seeks satisfaction of the judgment debt only as against the first respondent through execution levied against the latter's immovable assets in these proceedings. It is common cause that no attempt was made by the applicant to execute against the movable property of the first respondent before seeking an order of special executability in terms of Rule 46(1)(a)(ii) of the Rules of Court. It is further common cause that Standard bank, who was not joined to the proceedings, is the registered bondholder over the first respondent's properties, in which capacity it is both a secured and preferent creditor.

4. The second respondent, Mr Tshireletso Harold Dira, deposed to the answering affidavit both in his personal capacity and on behalf of the first respondent. As the third respondent took no part in these proceedings, any reference to 'the respondents' in this judgment is in reference to the first and second respondents.

Grounds of opposition

5. The respondents oppose the application based on the following points raised *in limine*:

- (i) That the application is ‘fatally defective’ because the applicant failed to deal with ‘certain vital jurisdictional facts’ in its papers for purposes of enabling this court to consider the setting of a reserve price for any sale in execution of the properties, such as failing to provide documentation in the form of a sworn valuation in support of the market value of ‘the immovable property’ (presumably a reference to the property presently occupied by the second respondent) or any document evidencing the amounts owing to the local authority as rates and other dues and ‘any other factor which may be necessary to enable the court to give effect to sub-rule (8)’ of Rule 46A, and as such, failed to comply with the provisions of Rule 46A(5);
- (ii) That the applicant failed to notify the Registrar of Deeds and the registered bondholder of the application as required by Rule 46A(3)(b) and/or failed to join such parties, both of whom are alleged to have a ‘vested interest’ in the proceedings and as such, are ‘essential parties’ (notification of interested parties and non-joinder of essential parties defence);
- (iii) That one of the properties sought to be declared specially executable (Erf 1313 Greenstone Hill, Ext 15, Johannesburg) comprises the primary residence of the second respondent and his family (wife and three minor children) and if it is declared executable, the second respondent and his family will have ‘no home and be on the street’ in that ‘they have no alternative accommodation available to them’; and
- (iv) The applicant failed to explore alternative remedies ‘to satisfy the *arrear amount*,’ which are ‘less drastic’ than the relief sought to declare the one property (comprising the second respondent’s primary residence) executable, such as by means of execution first levied against the movable property of the first respondent, as envisaged in Rule 46(1)(a)(i) of the Rules of Court.

6. In addition, the respondents state that they ‘dispute the judgment granted against them and reserve their rights to proceed with an application for leave to appeal, alternatively, an application for rescission of judgment.’

Relevant facts

7. The following facts were either common cause or not disputed and not refuted on the papers:

8. On 5 June 2018, the applicant issued a combined summons out of this court

against the respondents, seeking the following relief:

- 8.1. Payment of the sum of R4 599 929.51'
- 8.2. Interest thereon calculated at the rate of prime plus 2.5% from 1 May 2018 to date of final payment;
- 8.3. Costs of suit on the scale as between attorney and own client.

9. After the action became defended, the applicant applied for summary judgment to be entered against the respondents. The summary judgment proceedings, which were opposed, were postponed on several occasions at the instance of the respondents¹ until it was finally determined a year later, with the second respondent appearing in person on the day of hearing to oppose the grant of summary judgment.

10. On 25 June 2019, summary judgment was entered against the respondents. An order was granted by Nobanda AJ, which accorded with the prayers outlined in paragraph 8 above (the court order).

11. The respondents' underlying indebtedness to the applicant is not disputed in the answering affidavit. Although they reserve their right to do so, the respondents have, to date, taken no steps to initiate or prosecute an application for leave to appeal the summary judgment and order, nor have they applied for rescission of judgment. As such, the court order stands as unchallenged and the judgment debt remains wholly unpaid.

12. Despite demand, the respondents were unable (or have refused) to satisfy the judgment debt.

13. The second respondent owns neither of the two properties against which an

¹ On one occasion, a postponement eventuated when the respondents indicated their willingness to settle the indebtedness to the applicant (which indebtedness was not in dispute) but failed to act thereon. On another occasion, the second respondent appeared in person (notwithstanding that the respondents were legally represented at the time), and informed the court that the first respondent had been placed in business rescue. Despite requests by the applicant for proof of either a resolution or a court order confirming the business rescue proceedings and status of the respondents, none was forthcoming. Three sets of attorneys were appointed by the respondents over the course of the summary judgment proceedings, with all three sets of attorneys withdrawing from representing the respondents at different periods.

order of special executability is sought. The first property is situate at [...]('K property'). The second property, which is situate at [...] (S property), is the property which is said to be the second respondent's primary residence. According to the Sherriff's returns of service filed in the application (the contents of which were not disputed), the K property was found to be vacant by the Sherriff on 2 March 2020. The S property was found to be occupied by one, Mr Mahan, whose employee (Ms Moyo), accepted service on his behalf on 24 February 2020. The Sherriff's return reflects that Ms Moyo confirmed to the Sherriff that her employer, Mr Mahan, was the current occupant at the address. Both properties comprise residential immovable property, although it is uncertain from the papers as to whether or not the K property comprises vacant land, albeit zoned for residential use, or has a vacant building situate on the land.

14. The applicant has chosen to excuss the principal debtor (first respondent) without, at this stage, proceeding with recovery of the judgment debt against the subsidiary debtor (second respondent) personally.

15. The judgment debt forming the subject matter of these proceedings was incurred extraneous to the indebtedness incurred by the first respondent towards the registered bondholder.

Condonation

16. Before turning to the merits of the respondents defences, it is convenient to deal with the respondents' application for condonation for the late filing of the answering affidavit. The application for condonation was not opposed at the hearing of the matter. The respondents have advanced satisfactory reasons for the late filing of their papers and the delay occasioned by the late filing of the answering affidavit is slight. Suffice it to say that the respondents encountered certain difficulties during stage 1 of the national lockdown in South Africa, declared in terms of the National Disaster Act, least of all by the restriction of movement imposed on citizens at the time, which hampered the ability of the second respondent to locate relevant documents to enable him to consult with the respondents' legal representatives or the timeous retrieval by the respondents' legal representatives of relevant documents contained in the court file at the High court, Johannesburg. There was

also no prejudice suffered by any of the parties as a result of the late delivery of the papers. It is therefore in the interests of justice to grant condonation.

Evaluation of the respondents defences

Non-compliance with the requirements of Rule 46A Is Rule 46A applicable?

17. The applicant submits that the protections afforded to judgment debtors in terms of the provisions of Rule 46A are not available to the respondents in these proceedings, given that the first respondent is a juristic entity and that for obvious reasons, neither property is its primary residence. Moreover, since these proceedings are aimed at excussing only the first respondent and absent recourse being sought against the second respondent, the latter is not the judgment debtor for purposes of these proceedings and hence the provisions of Rule 46A of the Rules of court do not find application.

18. For the respondents, it was submitted that although the provisions of Rule 46A do not ‘technically apply’ in the present matter, the court should nonetheless, in performing an oversight role, accord to the second respondent the benefit of the procedural protections afforded in Rule 46A to debtors who are natural persons and who are at risk of losing their primary homes, such as the second respondent.

19. Rule 46A (1) and (2) provides as follows:

“(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2)(a) A court considering an application under this rule must –

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) *The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.”*

20. Rule 46(1) regulates the process for executing against the immovable property of a judgment debtor, which process includes execution against residential immovable property of a judgment debtor, subject however to the provisions of rule 46A where such residential property constitutes the primary residence of the judgment debtor. If it does, Rule 46A(2)(b) enjoins the court to consider all relevant factors to determine whether execution is warranted, with the aim of safeguarding the rights of the debtor where the execution process would amount to a deprivation of the right to access adequate housing as enshrined in section 26 of the Constitution.

21. Rule 46A accords the protection of judicial oversight to debtors who are at risk of losing their primary residence, as a safeguard against attempts by unscrupulous creditors to exact payment of a debt through execution against the primary residence of a debtor when other reasonable and less invasive avenues of payment may be pursued and to ensure that execution is proportionate, having regard to all relevant circumstances. The safeguards afforded by the procedural mechanisms contained in Rule 46A to individual consumers who are at risk of losing their homes are further aimed at preventing an abuse of the process.

22. The difficulty with counsel’s submission (recorded in paragraph 18 above), however, is that in *Folscher*,² the Full Court in this division held that ‘*Immovable property owned by a company and a close corporation or a trust of which the member, shareholder or beneficiary is the beneficial occupier is not protected by the amended Rule [a reference to Rule 46(1)(a)(ii)] requiring judicial oversight by way of an order of court authorising a writ of execution, even if the immovable property is the shareholder’s, member’s or beneficiary’s only residence.*’ The court also held that the term ‘judgment debtor’ refers to an individual person (not a juristic person).³ The

² *Firststrand Bank Ltd v Folscher and another, and Similar Matters* 2011 (4) SA 314 (GNP), para 32

³ *Id*, para 31. See too: *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ), para 69; *Investec Bank Limited v Fraser N.O. and Another* (33437/2019) [2020] ZAGPJHC 107 (6 May 2020), paras 35 & 36.

Full Court distinguished between a judgment debtor who resides in a home and who is in danger of losing that home in unfair circumstances and a judgment debtor which is a legal entity where the right to access adequate housing is not implicated regardless of who occupies the property. It held that ‘judgment debtor’ refers to ‘an individual, a person’ and concluded that *“It is therefore the primary residence owned by a person [judgment debtor] that falls within the purview of the rule.”*⁴

23. In *Investec*,⁵ the court had occasion to consider whether constitutional considerations and protections are available to a beneficial occupier of property owned by judgment debtor who is not a natural person and concluded, in reference to cases such as *Folscher* and *Mokebe* that ‘the provisions of rule 46A are not applicable as the property sought to be executed against is registered in the name of the Trust and it is irrelevant that the trustee and her children reside on the property and consider it their home. Since the Trust, being the judgment debtor, is not a natural person, the constitutional safeguards are not available to it where execution is sought against its immovable property.’⁶

24. The practical application of the principle of *stare decisis* (doctrine of judicial precedent) is that courts are bound by their previous judicial decisions (unless satisfied that the decision is clearly wrong) as well as the decisions of courts superior to them (unless distinguishable on the facts).⁷ In accordance with the doctrine of judicial precedent I am bound by the decision of *Folscher*. I am in any event unable to find that the decision in *Investec* is wrong apropos the applicability of Rule 46A to beneficial occupiers of immovable property that are owned by a judgment debtor who is a juristic person (such as the first respondent *in casu*).

25. Insofar as the respondents rely, in their heads of argument, on the following extract in *Erasmus*:

“ It would seem that if immovable residential property is merely nominally registered

⁴ *Folscher*, para31.

⁵ *Investec Bank Limited v Fraser N.O. and Another* (33437/2019) [2020] ZAGPJHC 107 (6 May 2020).

⁶ *Investec*, para 55.

⁷ *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), para 28; *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* (1250/2016) [2018] ZACC 19 (16 March 2018), paras 3 & 4.

*in the name of a legal person or trust, but used as a dwelling by the shareholder(s) or the trustees/trust beneficiaries (depending on the nature of the trust deed), as the case may be, the property falls within the ambit of rule 46A in the event that the legal person or the trustees in their official capacity are the judgment debtors and the judgment creditor wants to execute against the property. Otherwise the provisions of the rule could easily be circumvented by the judgment creditors.”*⁸ there is no evidence before me that the properties in question are ‘merely nominally registered’ in the name of the first respondent so that the second respondent is to be regarded as the judgment debtor in his official capacity. Moreover, as pointed out in *Investec*,⁹ although the quoted passage from Erasmus refers to the *nominal* registration of the property in the name of a legal persona, it is not clear how this type of legal persona differs from the type contemplated in *Folscher*, such that it should be treated differently.

26. Although the second respondent is notionally a debtor in respect of the judgment debt, the applicant is not seeking to obtain satisfaction of the judgment debt against him personally. His assets are not sought to be attached or executed against by means of these proceedings. Should the applicant succeed in obtaining satisfaction of the judgment debt through execution levied against the immovable assets of the first respondent, the liability of the second respondent will be extinguished, if not wholly, then in part, in which latter event, the judgment creditor would be entitled to pursue further remedies against the first or the second respondent, or both, in separate proceedings. In my view, the second respondent, assuming the correctness of his averment that he occupies the S property as his primary residence, is therefore in no different position to the ordinary beneficial occupier who is not a debtor, as envisaged in *Folscher*.

27. In so far as a higher court may be persuaded to disagree with the conclusion arrived at in para 26 above, I consider it prudent to adopt a cautious approach regarding the position of the second respondent and will therefore consider relevant factors in determining whether execution should be authorised in respect of the S property. For purposes of this enquiry, I will assume the correctness of the allegation

⁸ Erasmus, Superior Court Practice, Vol 2, 2nd ed, page 632R.

that the second respondent is currently resident at the S property together with his wife and minor children and that they consider such property to be their primary residence.

28. It would be wise to reflect upon relevant guiding judicial dicta in matters involving execution against a debtor's primary home. Starting with *Jaftha*,¹⁰ the Constitutional Court cautioned that, in considering whether execution is justifiable or not, the interests of creditors must not be overlooked. Thus, for example, where the creditor's advantage in execution outweighs the harm caused to the debtor, it may be justifiable to execute. The court put it thus: '*...a consideration of the legitimacy of a sale in execution must be seen as a balancing process.*' This balancing exercise is aimed at determining whether execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by immense prejudice and hardship that will be caused to the debtor. The size of the debt will be a relevant factor for a court to consider and whether the sale of the home is likely to render the 'judgment debtor' and his or her family completely homeless.¹¹ Factors such as the circumstances in which the debt arose; whether or not there has been any abuse of court procedure; the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home; and attempts made by the debtor to pay off the debt are all relevant factors.

29. In *Saunderson*¹² it was said that '...When judgment is given against a debtor and the debtor fails to satisfy the judgment debt the process for recovery of the judgment debt is by execution against the judgment debtor's belongings. It is a long-standing practice of our courts that execution must be directed first against the debtor's movable property and only thereafter, if the movables are insufficient, against immovable property, but a court may alter that sequence...When an order is granted declaring executable the property specially hypothecated that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.' (footnotes omitted) (own emphasis).¹³ The court in *Saunderson* clarified

⁹ Investec, cited in fn 5 above, par 60.

¹⁰ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), para 42.

¹¹ *Jaftha*, paras 56 & 57.

¹² *Standard bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), para 3. See too;

¹³ As to the alteration of the sequence alluded to in *Saunderson*, see: *Changing Tides 17 (Pty) Ltd N.O. v neal*

that *Jaftha* did not decide that s26(1) of the Constitution (which enshrines a right of access to *adequate* housing – and the impact of that right on execution against residential property) is compromised in every case where execution is levied against residential property. More importantly, the SCA highlighted that a plaintiff is called to justify an infringement of a constitutionally protected right only once it has been established that infringement has in fact occurred.¹⁴

30. In *Gundwana*,¹⁵ Froneman J stated that ‘it must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.’

31. In *NPGS*,¹⁶ the SCA reiterated that ‘...there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionality between the execution and other possible means to exact payment of the judgment debt.’ The NPGS case did not involve a mortgage bond needed to acquire a personal residence. The relevant loan was a commercial loan, to be employed in the business of the Close Corporation. Davis AJA stated, at para 61 of the judgment, that ‘*these facts alone may not be sufficient to justify a full inquiry into whether an execution of a residential property should take place.*’

32. In *Nkola*,¹⁷ the SCA held that a judgment creditor may execute against immovable property if a judgment debtor has failed to point movables out and make them available. In that case, the movable assets of the debtor were alleged to exceed the value of the judgment debt. The issue arising for determination was

Frasenburg, Case No. 19353/2019, an unreported judgment of Rogers J in the Western Cape Division of the High court, delivered on 2 July 2020, at paras 17 to 21.

¹⁴ Saunderson, par 20.

¹⁵ *Gudwana v Steko Development CC and others* 2011 (3) SA 608 CC, para 54.

¹⁶ *NPGS Protection and Security Services CC and another v FirstRand Bank Ltd* 2020 (2) SA 494 (SCA), per the majority judgment of Davis AJA, paras 53 & 55.

whether a judgment creditor was entitled, in those circumstances, to have two immovable properties belonging to the debtor declared specially executable. Lewis JA concluded that in all cases where a debtor's home is in issue, a court must look at the circumstances of the debtor and exercise a discretion. The learned Judge went on to state that "Rule 46(1)(a)(ii) was amended so as to include a proviso that 'where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property'. The proviso reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy without a proper consideration of his or her circumstances." The court found that the judgment debtor, who was a person of considerable means (on his own version) was not the kind of person who qualified for the protection required by *Gundwana*. The fact that execution was sought against a house that was his primary residence was of no consequence as the judgment debtor had the means to avert the execution of the judgment debt and chose not to pay his admitted liability. The learned Judge thus concluded that "There is no justification in this matter to read the requirements of rule 45(1)(a) conjunctively. 'Or' need not be read as 'and' save where a debtor is indigent, has insufficient assets to satisfy the debt and is at risk of losing his... primary residence."¹⁸

33. In *Nkola*, the judgment debtor's stance was that the judgment creditor must seek out the movables and sell them before attempting to execute against his immovable properties. The learned Judge observed that the judgment debtor 'would place the duty on the judgment creditor instead of resolving his financial problems himself' and went on to state, at para 11 of the judgment, that 'I consider that the common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available.'

34. With these guiding principles in mind, I now turn to a consideration of the relevant circumstances.

¹⁷ *Nkola v Argent Steel Group (Pty) Limited t/a Phoenix Steel* 2019 (2) SA 216 (SCA).

35. The underlying loan that formed the subject matter of the judgment debt was not utilised to acquire either of the first respondent's properties. The relevant loan was a commercial loan, to be employed in the construction business (residential sector) operated by the first respondent. The respondents' indebtedness to the applicant has not been disputed and the court order of 25 June 2019 presently stands unchallenged. In any event, from a perusal of the answering affidavit filed by the respondents in the summary judgment proceedings, it is clear that no defence was raised in relation to the respondents' liability apropos the indebtedness that was claimed to be due, payable and owing to the applicant – the only defence raised, was in relation to the alleged business rescue status of the first respondent, which defence itself remained unsubstantiated.

36. The respondents have been aware of their indebtedness since 2018 and of the judgment debt since 25 June 2019, but have taken no steps to pay the judgment debt. They have also not put forward concrete reasonable proposals for paying off the judgment debt, nor have they disclosed or offered up any movable assets that could be utilized towards realization of the debt. The respondents managed to ward off the grant of summary judgment for a period of a year, without making any attempt to settle what emerged to be an admitted indebtedness.

37. A claim of primary residence has only been raised as against the S property and not the other property, which is zoned as 'residential,' but appears to be a small holding that is vacant. It is uncertain whether this property contains a residence as such. As regards the S property, as at 24 February 2020, the Sherriff's return reveals that a third party tenant was in occupation of the residence, and not the second respondent. This carries the necessary inference that the property was being let out by the first respondent, ostensibly for financial gain. The second respondent baldly avers in the answering affidavit that he occupies the S property together with his family and that it constitutes their primary residence. Vital information regarding the circumstances under which the second respondent came to occupy such property, i.e., whether in terms of a lease agreement or on some other basis; whether he is paying for such occupancy and if so, in what amount, was not disclosed by him, nor

¹⁸ Nkola, para 17.

were any specifics of his financial circumstances disclosed, as was incumbent upon him to do. It was mentioned by counsel from the bar during presentation of oral argument that the second respondent relocated to the S property only after service of the application upon the respondents. One cannot but wonder whether this was a calculated move designed to avoid or delay execution against the first respondent's property. Despite having been given notice in terms of section 26 of the Constitution and despite having been notified, *inter alia*, that the respondents were required to place evidence of relevant facts before the court, the deponent to the answering affidavit chose to disclose only the bare minimum of information to this court by means of bald allegations without providing evidence in substantiation of the averments.

38. The respondents take the technical point that the applicant has failed to explore alternative means to satisfy the judgment debt, namely, by means of attachment of the first respondent's movable assets in circumstances where the respondents have not disclosed the nature, extent, value and location of any such movables. As will be demonstrated later, the second respondent is not indigent and none of the other factors mentioned in *Nkola*¹⁹ find application. This point therefore lacks merit.

39. The answering affidavit was deposed to by the second respondent on 8 June 2020. The second respondent alleged that *'As a result of the Covid-19 lockdown and the restrictions imposed thereby, the First Respondent has not been able to conduct its business operations from 26 March 2020 until such time as the country enters Alert Level 1 of the lockdown restrictions. This resulted in myself not having been able to earn an income for the last two months, and I am still not earning an income due to the fact that the First Respondent will only be able to conduct its business operations when Alert Level 1 of lockdown is declared. As a result, I will not be able to relocate my family and myself, should the above Honourable Court authorize the properties to be sold on public auction. My family and I will be left on the street with nowhere else to go, should the Applicant be successful in its application in terms of Rule 46A.'*

¹⁹ *Nkola*, at para 17, quote in para 32 above.

40. Lockdown level 3 commenced on 31 May 2020. Level 2 commenced on 17 August 2020, whilst level 1 commenced on 21 September 2020. Information widely publicized in the public domain indicated that the commercial construction sector was scheduled to operate at level 3 whilst the residential construction sector was scheduled to operate at level 2 of the lockdown. I mention this merely to illustrate that on the second respondent's own version, he was in gainful employ and earning an income at least until the 26 March 2020, which probably resumed prior to the country moving to level 2 of the lockdown but at worst, on 21 September 2020 when level 1 was declared. The second respondent has not disclosed where he lived prior to his occupancy of the S property (sometime after February 2020), nor has he indicated why he will be deprived of access to *adequate* housing located elsewhere, as he had indeed enjoyed prior to February 2020, should execution ensue. He has failed to demonstrate that execution will result in an unjustifiable infringement of his section 26 rights.

41. No abuse by the applicant of the execution process has been alleged or demonstrated in these proceedings.

42. Given that the issue of the first respondent being placed or having been placed in business rescue (due to financial distress) was on the cards as long ago as 2018, well before the advent of Covid-19, and given that there exists no evidence to show that there is a real prospect that the judgment debt might yet be paid, the submission by the applicant that there exists no reasonable likelihood that the judgment debt will be paid in full or partially within a reasonable period, apart from execution, is not without measure of force.

43. Objective values obtained from the two respective Windeed Property reports attached to the papers reveals that the K property has an estimated market value of R2.950 million. The municipal value is indicated as R2.488 million. There is a covering mortgage bond registered over the property in favour of Standard bank for the sum of R1.4 million. The bond was registered in November 2006. The

outstanding municipal charges owed to the third respondent is R96,336.28.²⁰ A reserve price set at R1787 568.00 would be reasonable.²¹

44. The S Property has an estimated market value of R3.215 million and a municipal value of R4.102 million. There is a covering mortgage bond registered over the property in favour of Standard bank for the sum of R1.6 million. The bond was registered in March 2007. The outstanding municipal charges owed to the third respondent is R158,404.75. The applicant submits however, that the interests of the City of Johannesburg and those of the existing bondholder over the properties are guaranteed, given that they are both preferent creditors with the registered bondholder being a secured creditor too. A reserve price set at R2,409.118.00 would be reasonable.

45. Both properties were purchased some 13 years ago. The applicant submits that after 13 years of servicing the bond, the properties will both likely have equity in excess of the amount due to Standard bank. The applicant further avers that despite the fact that the properties are encumbered, it is highly probable that it will realise sufficient proceeds from the sale of the properties to discharge a substantial portion of the judgment debt. The outstanding bond liability in respect of the properties as not been disclosed on the papers. Whilst the amount of the outstanding bond liability would likely fall within in the knowledge of the second respondent, he too, failed to disclose same.

46. The respondents baldly deny the values ascribed to the properties by the applicant or that equity will be retained on a forced sale of the properties. They have not suggested alternate values, nor have they put up objective valuations to refute the allegations in the applicant's papers.

47. Although the valuations obtained by the applicant are not attested to under oath, I remain doubtful as to whether the facts of this matter are sufficient to justify a

²⁰ The respondents have no put up any evidence to refute the market values provided in respect of either of the properties.

²¹ I have calculated the reserve price according to a formula commonly employed by banks in foreclosure matters, namely, market plus municipal value to obtain an average value, less outstanding municipal charges, less 30% (using figures rounded off to nearest even number).

full inquiry into whether an execution of a residential property should take place. With that in mind, I consider that sufficient evidence has been placed before the court to consider whether the relief sought is disproportionate to the judgment debt. I conclude that it is not. Sufficient facts have also been disclosed in the applicant's papers to determine whether a reserve price ought to be set for the sale of the properties. It is in any event not in dispute on the papers that a reserve price should be set, even though the precise value of the outstanding bond liability is not presently known. That effectively puts paid to the defence that the applicant has failed to deal with 'jurisdictional' facts required for the setting of a reserve price. The court retains a discretion to determine the amount of the reserve price. On the evidence available, a reserve price that caters for the full amount of the bond liability will not be prejudicial to the bondholder and will ultimately inure to the benefit of the respondents. The merit or value of setting a reserve price for purposes of a sale in execution was underscored in *Mokebe*²² Ultimately, the setting of a reserve price inures to the benefit of a debtor in that it safeguards against the property being sold at an inordinately low price, unrelated to the true value of the property, resulting in the situation whereby a debtor loses his home and remains saddled with a larger than necessary outstanding liability to the judgment creditor.

48. I turn to deal with the other technical defences raised by the respondents in these proceedings. As to the point of non-joinder of the bondholder in these proceedings, it is trite that before a party has to be joined as of necessity, it must be shown that such a party has an interest in the right which is the subject matter of the litigation which is not merely a financial or indirect interest in such litigation.²³ Standard bank, by reason of its financial interest, is thus not a necessary party to these proceedings. In any event, Rule 46(5) expressly provides that no immovable property which is subject to any preference shall be sold in execution unless the executing creditor has advised the preferent creditor in writing of the intended sale and the latter has been afforded an opportunity to agree to a sale with a reasonable reserve price or a sale without reserve. The bondholder's position is thus secured without any necessity for it to be joined in these proceedings. Although the bondholder has not yet presented its views on what a reasonable reserve price

²² *Mokebe*, cited in fn 3 above.

should be, the order which I intend to make will cater for this eventuality. Both parties hold the view that a reserve price should be set in the event that an order authorising execution is made herein.

49. As for the Registrar of Deeds, Rule 46(3) and 46(8) inform the processes to be followed preceding a sale in execution after attachment has been secured. I am not persuaded that the Registrar of Deeds is an 'essential' party, as the application has no bearing on the registration of any deed, but simply a declaration of special executability in respect of the immovable properties.

50. The applicant submits that it will be prejudiced in the event that it is prevented from obtaining relief, as, in such event, the respondents will be in a position to either dispose of or further encumber the properties. Such conduct will prejudice the applicant's chances of recovery of the judgment debt and without the security of an attachment the applicant will lose any security of repayment of the judgment debt. I am inclined to agree, given that several facile defences, which, to borrow from the words of Davis AJA in *NPGS*,²⁴ 'were dressed up as being technically proficient', were the only ones presented to resist an order of special executability.

51. On the second respondent's own version, he has been in fixed, gainful employment, which, on his version, would have resumed during level 1 of the lockdown. Given the relaxation of lockdown restrictions in both levels 1 and 2, there is no reason to believe that the second respondent is not presently able to generate income with which to procure adequate alternative accommodation. On the facts, the second respondent does not fit the demographic of an indigent, vulnerable or poor debtor. He was able to employ the services of counsel and attorneys in the matter, no doubt, at a considerable cost. In today's economic climate, that is no small feat. He is living in accommodation to which he relocated only after service of this application, a property which is valued in excess of R2 million and which is located in an upmarket estate. Whether he lived in similar accommodation prior to his relocation to the first respondent's property has not been disclosed by him. Having regard to the peculiar circumstances, I am not persuaded that there are any factors

²³ See: *Strydom v Engen petroleum Limited* 2013 (2) SA 187 (SCA) at paras 23 and 24.

or circumstances which militate against a finding that execution is justifiable.

52. For all the reasons given, the applicant has established its entitlement to relief sought by it. The order that I propose making will afford the applicant to approach the court, on the same papers, duly supplemented, should the reserve price (as determined in the papers and agreed to by the parties) in respect of a future sale in execution of the properties require revision once the registered bondholder has been given an opportunity to express its views.

53. The general rule is that costs follow the result. I see no reason to depart therefrom.

54. Accordingly, the following order is granted:

ORDER

1. The late filing of the answering affidavit is condoned.
2. The following Immovable Properties are declared specially executable:
 - 2.1 Erf [...] Greenstone Hill Ext 12, Johannesburg, held under Title Deed T151793/2006; and
 - 2.2 Erf [...] Greenstone Hill, Ext 15, Johannesburg, held under Title Deed T33053/2007.

("the Immovable Properties")
3. The Registrar of Court is authorised to issue a writ of execution in respect of the Immovable Properties in order to give effect to the order granted in prayer 1 supra;
4. The sale in execution of the aforesaid immovable properties shall be subject to a reserve price, which is set as follows:
 - 4.1 For Erf [...] Greenstone Hill Ext 12, Johannesburg, held under Title Deed T151793/2006, the reserve price is set at R1 787 568.00; and
 - 4.2 For Erf [...] Greenstone Hill, Ext 15, Johannesburg, held under Title Deed T33053/2007, the reserve price is set at R2 409 118.00.
5. The Plaintiff is entitled to approach this Court on the same papers, duly

²⁴ NPGS, cited in fn 15 above.

supplemented, for a variation of the reserve price if a change in the factors influencing the reserve price necessitates a change of the reserve price, or in the event that the reserve price is not obtained at the sale in execution.

6. The First and Second Respondents are ordered to pay the costs of this application on an attorney and own client scale, jointly and severally, the one paying the other to be absolved.

A. Maier-Frawley

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand- down is deemed to be 16 November 2020.

Date of virtual hearing: 8 October 2020

Judgment delivered: 16 November 2020

APPEARANCES:

Counsel for Applicant: Ms KA Wilson

Attorneys for Applicant: DMO Attorneys

Counsel for Respondent: Mr JJ Venter

Attorneys for Respondent: Morne Coetzee Attorneys