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

Case Number: 2021/11116
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
16.05.23

In the matter between:

INVESTEC BANK LIMITED

Applicant

and

MPHO LITHA

Respondent

Neutral Citation: *Investec Bank Limited V Mpho Litha* (Case No. 2021/11116)
[2023] ZAGPJHC 487 (16 MAY 2023)

JUDGMENT

STRYDOM, J

Introduction

- [1] This is an application for a money judgment and to declare immovable property executable brought by the applicant, Investec Bank Limited, for an order granting judgment against the Respondent, Ms Mpho Litha, for payment of R917,876.22 (nine hundred and seventeen thousand, eight hundred and seventy six Rand and twenty two cents) together with interest and that the

property described as the Remaining Extent of Erf [...], Kelvin Township, Registration Division I.R., Local Authority City of Johannesburg, The Province of Gauteng, measuring 2,156 square metres, held by deed of transfer number 7146152/2001 (the Property).

- [2] The applicant also seeks that a reserve price, as determined by this Court, be set for the Property pursuant to Rule 46A(8)(e).

The applicant's case.

- [3] On 25 February 2011, the applicant and the respondent concluded a written home loan agreement in terms of which the applicant lent and advanced to the respondent the sum of R855 700.00, repayable over 240 months in monthly instalments of R15 160.90 which loan was secured by a mortgage bond over the Property for the capital sum of R850 000.00.
- [4] About 10 January 2021, the respondent executed a further mortgage bond in favour of the applicant for the sum of R545 000.00, against the property. This meant that the applicant is secured in combined capital sum of R1 395 000.00.
- [5] The respondent breached the agreement by failing to make payment of the instalments as and when they fell due. The loan facility has remained in arrears for three years now, i.e., since October 2018. Despite demand, the respondent failed and/or refused to bring the arrears up to date, save for a few nominal payments towards the respondent made towards the loan facility since January 2020, which are substantially lower than the instalments and have resulted in the arrears increasing dramatically. When the indebtedness was called up on 10 October 2020 the arrears were R125 037,96.

The respondent's case.

- [6] The respondent opposed this application and filed an answering affidavit wherein various defences were raised. In the affidavit it was contended that the applicant is required to demonstrate that (i) there are exceptional circumstances justifying the relief sought and (ii) that the order will not unduly prejudice the respondent or cause her to suffer irreparable harm.

[7] The respondent contended further that the deponent to the founding affidavit does not have the requisite personal knowledge for purposes of these proceedings.

[8] The respondent also contended that, and raises such contentions *as points in limine*:

- a. The applicant seeks to declare the Property executable where the value of same is allegedly in excess of the debt owed.
- b. The applicant can, and should, convene an inquiry in terms of section 65 of the Magistrates' Court Act 32 of 1944; and
- c. The respondent's right of access to adequate housing will be unjustifiably infringed if the Property is declared specially executable.

Issues for determination

[9] Before this court respondent appeared in person and the points taken and defences were not pursued. There is in any event no merit in the defences and points *in limine* raised. The debt and the breach of the home loan agreement was not disputed. The only defence which was persisted with is that the court considering all the circumstances of this case should not declare the Property executable as such property was the primary residence of the respondent and her children. It was argued that the order will unduly prejudice the respondent or cause her to suffer irreparable harm.

[10] The question for decision is whether the respondent has discharged her onus to prove that an order of special execution will unjustifiably infringe her right of access to adequate housing.

Relevant factors that a court must consider under Rule 46A(2)(a)(ii).

[11] In terms of Rule 46A(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 [...]”

[12] Rule 46A(2)(b) especially provides that:

“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.”

[13] In the matter of *Jaftha v Schoeman*, Mokgoro J in the Constitutional Court found that in a matter where execution is sought against property which is the primary residence of a judgment debtor a court must consider whether the rules of court have been complied with; whether there are alternative ways of recovering the judgement debt; further take into account, among other things, the circumstances in which the judgement debt was incurred; attempts made to pay off the debt; the financial position of the parties; the amount of the judgement debt; whether the judgement debtor is employed or has a source of income to pay off the debt; and other factors relevant to this case.¹

[14] In this regard, Henriques J in *The Standard Bank of South Africa Limited v Young and Another*² remarked as follows:

“Our courts have not attempted to prescribe the factors which a court should consider as this would have the effect of limiting the overall discretion of a court. However, among the factors which the court must consider are the circumstances under which the debt was incurred, and any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; and whether the debtor is employed or has a source of income to pay off the debt and any other relevant factor pertinent to the particular facts of a case.”³

¹ See *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 56-58. (*Jaftha*)

² *The Standard Bank of South Africa Limited v Young and Another* (D8880/2021) [2022] ZAKZDHC 30 (4 August 2022).

³ *Id* at para 28.

[15] Further, the applicant must state the manner in which it dealt with the respondents when it became clear that the latter was defaulting. The process of reaching the conclusion that execution was a last resort must also be disclosed. The underlying principle emphasized here is that execution against immovable property which is the primary residence of the judgment debtor requires judicial oversight – the aim of which is to give effect to section 26 of the Constitution which is to protect the right to adequate housing and security of tenure. Tritely, “the need for judicial oversight in such applications and the reasons therefore have been the subject matter of a number of court applications in the Supreme Court of Appeal, Constitutional Court and individual divisions of the High Courts”⁴

[16] In *Gundwana v Steko Development and Others*⁵, the Constitutional Court clarified that the *Jaftha* decision applies not only in exceptional cases but also in typical mortgage foreclosure cases brought before the high court.

[17] However, this does not imply that a judgment creditor's right should be unduly restricted by a Rule 46A defence claim. In *Absa v Mokebe*⁶ the court referred to the authors of Wille, who stated thus:

“The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have the property sold and obtain payment of is debt out of the proceeds of sale.”⁷

[18] The protection that Rule 46A seeks to evince is clear – it was enacted to give effect to section 26 of the Constitution and afford vital protection to indigent persons who risk losing their homes.

⁴ *The Standard Bank of South Africa Limited v Young and Another* (D8880/2021) [2022] ZAKZDHC 30 (4 August 2022). at para 24; see, also *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC); and *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

⁵ See *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) at paras 41-49.

⁶ *Absa v Mokebe* 2018 (6) SA 392.

⁷ *Id* at para 1.

[19] The Supreme Court of Appeal in *Petrus Johannes Bestbier and Others v Nedbank Limited*⁸ cited with approval, the decision in Jaftha supra and stated that:

"The text of rule 46A(l) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment debtor. Notably, rule 46A(2) provides that a court considering an application in which a creditor seeks to execute against the judgment debtor's immovable property must consider various matters."⁹

[20] The applicant filed an affidavit in accordance with Chapter 10.17 of the Practice Directive of this Division. In this affidavit the applicant dealt with all the issues which are mentioned in the Directive, *inter alia*, drawing the respondents attention to section 26(1) of the Constitution, that she can place information before this court regarding the relevant circumstances within the meaning of section 26(3) of the Constitution and the terms of Rule 46A of the Court Rules.

[21] It was shown that respondent was substantially in arrears with her payments for a considerable period. The outstanding amount as at 1 March 2021 was R917 876,22. The debt was incurred to obtain the Property. The applicant stated that the market value of the Property amounted to R2 000 000,00. The municipal valuation was for R1 613 000,00. The arrears in payment of rates and other dues amounted to R46 326,48.

[22] The respondent pointed out that she was a sole breadwinner who was providing for her 3 children and 81 year old mother. She previously held corporate jobs and she could pay the bond instalments. She lost her job and could not maintain the payments. When she appeared in person she informed the court that she now obtained a job again and will in future be able to pay bond instalments but not, at this stage, the arrear amounts. She averred that she will not be able to find a safe and convenient alternative place to stay with her family. Moving all of them out of the family home would, according to her,

⁸ *Petrus Johannes Bestbier and Others v Nedbank Limited* [2022] ZACSA 88 (13 June 2022).

⁹ Id at para 25.

adversely affect their stability and mental health. She submitted that if the property is declared executable she would be left destitute without a shelter.

[23] I have considered these circumstance against the rights of the applicant to realise its security. I am of the view that respondent would not be left destitute if the Property is sold.

[24] There are indeed still no satisfactory means other than a sale of the property in execution of satisfying the admitted debt. However, the respondent is now employed, and in receipt of an income that may enable her to obtain a loan to set off the defaults. In the same vain, the respondent is also now in a better financial position that will enable her to obtain alternative accommodation if she is required to vacate the property if it is sold in execution. She can rent a property.

[25] Having considered all the circumstances of this case I am of the view that execution against the Property is warranted.

[26] A reserve price should be set to protect the respondent against the Property being sold substantially lower that its value. In my view a reserve price in the amount of R1 200 000. 00 should be set.

[27] The respondent has been living on the Property for some time now but fell on hard times. She is currently gainfully employed. In my view it will take a while before she can re-establish herself. If she can obtain a loan she might even be able to keep her family home. For this reason the court will stay the execution of the warrant for a period of 3 months. If the respondent has not settled the judgment debt to the satisfaction of the applicant within 3 months of this order the execution against the Property may proceed.

[28] The following order is made:

1. judgment is granted against the Respondent for payment in the amount of R928 605.78 (nine hundred and twenty-eight thousand, six hundred and five Rand and seventy eight cents) together with interest at the applicant's Bond Rate (currently 11.25%) less 1.6% from 24

April 2023, calculated daily and compounded monthly to date of payment, both days inclusive;

2. the property described as Remaining Extent of Erf [...], Kelvin Township, Registration Division I.R., Local Authority City of Johannesburg, the Province of Gauteng, measuring 2,156 square metres, held by deed of transfer number T146152/2001 ("the Property") be declared specially executable;
3. the Registrar of this Court is directed to issue the relevant warrant(s) of execution as to enable the Sheriff to attach and execute upon the Property in satisfaction of the judgment debt, costs and interest thereon. The execution in terms of the warrant is stayed for a period of 3 months from date of service of this order;
4. the sale in execution of the Property shall be subject to a reserve price of R 1 200 000.00;
5. should the reserve price, as determined by this Court, not be achieved at a sale in execution, and unless written agreement is reached with the Respondent as to a lower reserve price, the Applicant may approach this Court, on these papers as amplified, for an order to proceed with a sale in execution with a lower reserve price or without a reserve price;
6. the Respondent is advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 ("NCA") apply to the judgment granted in favour of the Applicant. The Respondent may prevent the sale of the abovementioned Property if she pays to the Applicant the amounts that are overdue together with the Applicant's prescribed default administration charges and reasonable costs of enforcing the credit agreement up the time the default was remedied, prior to the Property being sold in execution;
7. a copy of this order is to be personally served on the Respondent as soon as practically possible after this order is granted; and

8. the Respondent is directed to pay the costs of this application on an attorney and client scale.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the applicant:

Mr. M. De Oliveira

Instructed by:

ENS Africa

For the Respondent:

Mrs. M. Litha

Instructed by:

In person

Date of hearing:

25 April 2023

Date of judgment:

16 May 2023