



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case number: 2020/5239

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES: YES
[3] REVISED: NO

SIGNATURE

DATE: 19 FEBRUARY 2024

In the matter between:

BUSINESS PARTNERS LIMITED

Applicant / Plaintiff

and

SYDMARY PROPERTIES CC

First Defendant

GIFT DAVID KAISER

Second Defendant / Respondent

LOURENS CAREL ZEEMAN

Third Defendant

Summary:

Application in terms of Rule 31(5) and Rule 41A - Judicial oversight and discretion whether to order execution against primary residence – obligation on debtor to place relevant current facts before court. No closed list of factors that court may consider in carrying out judicial exercise but a minimum threshold of current verifiable information relating to financial affairs is required from the debtor.

JUDGMENT

Z KHAN AJ

BACKGROUND

- [1] The Applicant and First Defendant concluded a loan and royalty agreement relating to a franchise called 'Auto Magic', to be operated by First Defendant. There was a breach of the agreement due to a default of payment and Applicant cancelled the agreement. A default judgment for monetary relief has previously been granted on 12 March 2021 against the First and Third Defendants. The application against the Respondent (Second Defendant) was postponed for purposes of judgment and considering execution relief against the immovable residential property of the Respondent.
- [2] The Respondent, the sole member of the First Defendant, bound himself as surety and co-principal debtor to Applicant, for the First Defendants performance in terms of the agreement. Further guarantees in the form of

Respondents primary residence was furnished by Respondent to Applicant. Respondent does not dispute the agreement or that he is indebted to the Applicant. The current indebtedness due to Applicant exceeds R 3 million and the National Credit Act is not applicable to the loan.

- [3] This application relates primarily to the Respondents opposition to the execution relief and reserve price for the sale of the Respondents primary residence. It is Respondents assertion that the Applicant ought to consider a payment plan that Respondent previous offered to Applicant as well as the argument that Applicant ought to execute against movables prior to executing against the Respondents primary residence.
- [4] The Respondent in heads of argument filed on 31 January 2022, raise certain issues relating to personal service and compliance with the Practice Manual of the division. These issues have since been overtaken by events and are no longer applicable.
- [5] The legal proceedings set out in Rule 46A serve to inform the protection of housing rights which implicates the right to dignity and the rights of children, where applicable. A number of judgments have been handed down by the courts for the exercise of a judicial oversight of executions against primary residential homes. Uniform Rule 46 echoes the call for judicial oversight that Mokgoro J mentioned in *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) at para 55:

‘Judicial oversight permits a (judicial officer) to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight.’

- [6] It is for the debtor to place all relevant facts and circumstances before a court so that a matter may be properly adjudicated upon¹. Any relevant circumstances that a debtor relies upon must be considered against the rights of the creditor lending institution. This is because commercial lending affects socio-economic rights and access to goods and services in a properly functioning economy².
- [7] If one is to have regard to *MOKEBE* and Rule 46A, it is expected that the Respondent would set out all relevant facts so as to enable the court to exercise judicial oversight when an order for execution of a primary residence is sought.³

PREFERRED EXECUTION AGAINST MOVABLES

- [8] The Respondent contends that there ought to have been execution against his movables prior to an execution against immovables. In *Gundwana v Steko Development* 2011 (3) SA 608 (CC), the Court confirmed that a judgment creditor is entitled to execute upon the assets of a judgment debtor in

¹ NPGS Protection and Security Services CC and Another v FirstRand Bank Ltd (314/2018) [2019] ZASCA 94; [2019] 3 All SA 391 (SCA); 2020 (1) SA 494 (SCA) (6 June 2019)

² ABSA Bank v Mokebe and Related Cases 2018 (6) SA 492 (GJ)

³ FirstRand Bank v Folscher 2011 (4) SA 314 (GNP)

satisfaction of a judgment debt sounding in money. The Court did qualify this view at [53] by stating that

‘If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders.’

- [9] As to whether the creditor ought to execute against every single movable asset of the debtor, we are informed by Rogers J (as he then was), in *Changing Tides 17 (Pty) Ltd NO v Frasenburgh* [2020] 4 All SA 87 (WCC), that:

‘[51] In making the rule 46A assessment, the prospect of the judgment debt being satisfied without recourse to the mortgaged property has to be investigated. If a debtor is substantially in arrears and fails to place information before court pointing to the existence of other assets from which the indebtedness might be satisfied, a court would generally be justified in proceeding on the basis that execution against the mortgaged property is the only means of satisfying the mortgagee’s claim... The court is instead insisting that the mortgagee execute against other assets of substance which are known to exist.’

- [10] The movables must therefore be ‘*of substance*’ in satisfying at least a portion of the judgment debt. Such information relating to the substantial value of the movable assets against the judgment debt ought to be placed before the court by a debtor so that the court may exercise its oversight.

[11] The very question of whether movables must be executed against as a rule of practice arose *obiter* in the matter of *Nedbank Ltd v Molebaloa* [2016] ZAGPPHC 863. The Supreme Court of Appeal in *NPGS Protection* refused to comment on such a practice. If such a practice exists then it would mean that a credit lender would have to excuss all movables prior to approaching a court to specifically execute against the secured immovable property. Such a procedure would render a creditors decision to lend on the basis of a preferred security compromised. Whilst a creditor would have to incur delay in first executing against movables and then obtaining a *nulla bona* return in order to revisit a court for specific execution, the interest bill is running, the immovable property risks being compromised and the creditor is all the more prejudiced.

[12] Such a practice would potentially require a creditor to endure the cost of execution against movables, a possible interpleader, sheriffs auctions and recovery of monies that might hardly service an interest bill.

[13] In this matter, Respondent does not disclose the full ambit of his movable assets or even if there are currently any movable assets to execute against. The considering of execution against movables therefore becomes moot.

THE EXECUTION AGAINST THE IMMOVABLE PROPERTY

[14] Respondent further tells the court vaguely that he made several attempts to negotiate the indebtedness but his overtures were rejected by Applicant. He

also undertakes to continue servicing the loan to Applicant on behalf of the First Defendant in order to protect his home.

- [15] The Respondent discloses in affidavits dated 2021 that his business is now generating a profit and he has 4 children (who, as at the date of this hearing are now all majors). He is also the sole breadwinner and a widower. The Respondent has been residing at the property for a period in excess of 20 years and he unable to purchase another property or rent a property large enough to accommodate his family. He states that he will become homeless if the property is executed upon. This is all information submitted more than 2 years ago.
- [16] In a supplementary affidavit dated 5 October 2021, Respondent advises that the First Defendant business has made some recovery in its earnings and is able to resume servicing the loan agreement. The information put up by the Respondent to stave off execution against the immovable property is that he made certain offers to the Applicant that were rejected. He indicates that the business was at some point making a profit of R150 000 but it is unclear if this is a gross or nett profit. Respondent also offered the Applicant the sum of R 42 500 towards the indebtedness. This comprised R30 000 towards interest and R12 500 towards the loan instalment.
- [17] Respondent does not put up any financial records of his business and he concedes that he is not drawing a salary. At best he states that 'there is still a substantial amount enough for me to pay the monthly instalment towards the

Applicant.’ It is also unclear as to how he would become homeless with a business generating income of R150 000.

- [18] Whilst it would be ill advised to set out a closed list of factors that a Respondent would be advised to place before a court in exercising its oversight, one would expect more substantial information. This would include bank statements of the Respondent and his business, lists of expenditure of the Respondent, better details in how he intends servicing his indebtedness, a list of movables available for execution and any other guarantees that he may be able to put up.
- [19] It would have been expected of Respondent to present a fresh affidavit between 2021 and date of hearing in 2024 indicating any changes in his circumstances or what steps he has taken to make any payments to the Applicant. None of this is forthcoming from Respondent. A Respondent in such circumstances ought to furnish a court with an affidavit supported by evidence, that is indicative of their current circumstances.
- [20] In the present matter, the Respondent appears to be of the view that the Applicant must engage with the Respondent and accept the Respondents offers, whatever they may be. This in the face of an ever-increasing indebtedness due to compound interest being added to the already existing debt. There is no general obligation on the Applicant to negotiate in good faith to assist the Respondent in the manner that he expects⁴. Such disclosure of

⁴ Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)

reasonable settlement proposals and interim payments can only assist the court in coming to a view regarding execution against a primary residence.

[21] Respondent alleges that the only prejudice to the Applicant is the non-payment of its debt. I must weigh up the prejudice to the Applicant against the prejudice to the Respondent. Applicant has been waiting for a substantial period of more than 3 years for payment of its debt. It has incurred the costs of numerous appearances before this court to bring this matter against Respondent to finality and the Respondent has not reaped the benefits of its loan granted. The Applicant simply cannot be compelled to keep waiting for the Respondents fortunes to change at some unknown future date.

[22] Ultimately the answer to the Respondents protestations is to be found in the dicta of *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) where Mokgoro J held at [58].

If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.

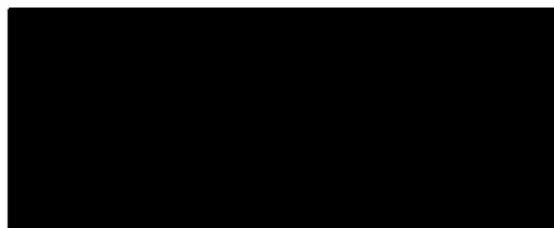
[23] I turn then to the reserve price for the immovable property. In this regard, there is direction given by the full bench of this Division⁵. The Applicant has furnished the Court with a private market valuation conducted on a comparative basis. The report contains vague allegations such as 'we have consulted with local estate agents'. There is also a municipal valuation for the property made available. The current outstanding indebtedness due to the municipality as at December 2023 is R223 077.13.

[24] In the result the following order is made:

1. Judgement is granted against the Respondent (Second Defendant) jointly and severally with First and Third Defendants, the one paying to absolve the other, in accordance with order (1) to (4) of the court order of Judge Mdlana-Mayisela dated 12 March 2021 under this case number;
2. The property situated at Stand 298, Liefde en Vrede corresponding with address 9 Katlagter Crescent is declared specifically executable;
3. A reserve price of R 1'657'000 is set in respect of the sale in execution of the immovable property.

⁵ ABSA Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ)

4. Respondent is to pay the applicants costs on the scale as between party and party.



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ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to as reflected on the Caselines computer system.

DATE OF HEARING: 19 FEBRUARY 2024

APPEARANCES:

COUNSEL FOR THE APPLICANT:

CL MARKRAM-JOOSTE

ATTORNEY FOR THE APPLICANT:

**STRYDOM BRITZ
MOHULATSI ATTORNEYS**

FOR THE SECOND RESPONDENT:

IN PERSON