REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

18/7/2013

CASE NO: 65295/12

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

16/07/2013 .... DATE

.... SIGNATURE

In the matter between:

ABSA BANK LIMITED **APPLICANT**

And

PETER EDWARD SILLARD
(ID NO:) **RESPONDENT**

JUDGMENT

WEBSTER J

1. On 7 February, 2013, Makgoba J granted default judgment against the defendant for (i) payment of the sum of R161 024.89, (ii) payment of interest thereon at the agreed rate of 8.50% per annum from 25 October, 2012 to date of payment, aforementioned date inclusive, (iii) costs of suit on the scale as between Attorney and client. The following order sought, *viz.*,

   An order declaring the property known as:

   1.1 "A unit consisting of:

(a) Unit 42 as shown and more fully described in Sectional Plan No. SS1369/1996 in the scheme known as SAN MARE in respect of the land and building or buildings, situated at MORELETA PARK EXTENSION 48 TOWNSHIP, LOCAL AUTHORITY: CITY OF PRETORIA of which section the floor area, according to the said sectional plan is 99 (NINE NINE) SQUARE METRES in extent, and

(b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by DEED OF TRANSFER: ST 121305/96

specially executable..." was postponed *sine die.*

2. The applicant seeks an order directing the Registrar of this Court to issue the "Warrant for Attachment" against the abovementioned property.

3. Two affidavits have been filed in support of the "Application in terms of Rule 46(1)(a)(ii)". In the first of these affidavits the deponent Kyle Mthokozisi Vilakazi avers that "*even though the arrear amount of this account is <u>relatively small</u> (my underlining) it should be noted that it constitutes a large percentage of the full balance bearing in mind that this is <u>a relatively small loan</u>*". It is further averred that the last payment was made "*...on 5 May, 2010*".

4. The second affidavit was made by Sabashnee Naidoo, "*...the Manager, Home Loan Recoveries Secured Collections and Retail Collections of ABSA Bank Limited*". The express purpose of her affidavit is to "*...particularly ... enable the above Honourable Court to consider the Plaintiff's application for an order to authorize the Registrar ... to issue a Warrant of Attachment*". The respondent did not contest the action.

5. In paragraph 8 of her affidavit Ms Naidoo sets out the following:

"***<u>Factors necessary to be considered at the time of considering the Plaintiff's Application in terms of Rule 46(1)(a)(ii)</u>***:

8. In support of the Plaintiff's application I request the above Honourable Court to take account of the following inter alia:

8.1 *The Courts attention is drawn to the fact that the Plaintiff implements various steps to rehabilitate an arrears account, which steps are taken prior to an account to be handed over for legal action. Several telephone calls are made to the Defendants to all available telephone numbers from the Plaintiff's Call-Centre before the matter is handed over to the Pre-Legal department of the Plaintiff, where again attempts are made telephonically to make an arrangement with the Defendants. The account stays in Pre-Legal for six months during which a field agent is also required to visit the property in question with the purpose of negotiating with the Defendants a repayment plan to rehabilitate the account. If no suitable payment arrangements can be made to bring the arrears up to date within a reasonable time the Defendants are offered a distress option called (**a help-u-sell agreement**) in terms whereof the Defendants would not be required to continue with monthly repayments and signs a mandate from which the Plaintiff is authorised to marked the property by way of estate agents, the internet and possible public auctions in order to realise the most favourable market related purchase price for the distressed property.*

8.2 *The Courts attention is further drawn to the fact that during the procedures referred to in paragraph 8.1 above, the Defendants have been repeatedly informed that their failure to rehabilitate the account will result in Judgment against them, attachment of their Immovable Property, a sale in execution and ultimate eviction from the property. It is therefore my submission that the Defendants are aware of the consequence of their failure to make arrangements and that further notice of this application would be redundant and will only result in unnecessary costs for the Defendants account.*

8.3 *The Section 129 Notices has been sent to the following addresses:*

i) To the domicilium address by registered post;

ii) To the street address which is obtained from the valuation report of the Plaintiff;

iii) To the postal address which is obtained from the Plaintiff's records which address, was chosen by Defendant where delivery of monthly statements should be sent.

8.4 *Notwithstanding the fact that the PLAINTIFF has caused notices in terms of Section 129 of the National Credit Act, 34 of 2005, to be delivered to the Defendants' home address, which is the property forming the subject of this application and despite all the above mentioned steps having been taken by the Plaintiff to reach a suitable arrangement, with the Defendants, no formal arrangement could be made.*

8.5 *A period of 11 days have lapsed since the dispatch of the Notice referred to in paragraph 8.4 above before legal action was instituted.*

8.6 *The immovable property which the Plaintiff seeks to have declared executable was not acquired by means of the assistance of a State Subsidy.*

8.7 *The Defendant has not made any payment, towards his Mortgage bond over the immovable property, since 5 May 2010.*

8.8 *The Plaintiff confirms that the information at our disposal shows that the immovable property is the primary residence of the Defendants.*

8.9 *The immovable property is utilised to the best of the knowledge of the Plaintiff, for residential purposes and not commercial purposes.*

8.10 *The debt which the Plaintiff seeks the payment of, was incurred in order to enable the Defendants to acquire the immovable property which the Plaintiff seeks to be declared executable.*

8.11 *The indebtedness of the Defendants to the Plaintiff is secured by the Mortgage Bond registered by the Defendants unto and in favour of the Plaintiff.*

8.12 *The immovable property over which the mortgage bond has been passed constitutes the Plaintiff's security in respect of the Defendant's indebtedness to the Plaintiff.*

8.13 *The Defendant consciously, and with the intention of securing the loan advanced by the Plaintiff unto and in favour of the Defendant, mortgaged the property to the Plaintiff, in the full knowledge that in the event that the loan was not repaid and there was a breach of the terms contained in the mortgage bond and the loan agreement, that the Plaintiff would rely upon such security and seek an order declaring the property executable, to achieve this end.*

8.14 *Given the willingness of the Defendant to put up as security the property which the Plaintiff seeks to be declared executable, it is respectfully submitted that the Plaintiff is entitled to such an order.*

8.15 *The Defendant having failed to make payment of the monthly instalments payable under the mortgage bond, has resulted in the full amount owing under the mortgage bond becoming due, owing and payable, and no possibility exists that the Defendant's liabilities will be liquidated within a reasonable period of time and execution against the primary residence seems to be the only option left to the Plaintiff.*

8.16 *In the light of the breaches by the Defendant of his obligations to make payment of the monthly instalments under the mortgage bond, there are not alternative methods for the Plaintiff to recover the debt in respect of the monies loaned and advanced by the Plaintiff to the Defendants."*

6. What is significant, however, is that Ms Naidoo, whilst setting out in detail the Applicant's policy in paragraph 8.1 and 8.2 *supra* there is no evidence on what the applicant did in this specific case. In my view it was incumbent on the applicant to have established on the visits to the respondent's home, bearing specifically in mind that the property in question is the primary residence of the "*...defendants*", who the occupants of the property were; whether the defendant Peter Edward Sillard was employed or not; his income; his financial situation; whether the payments could be restructured; whether there were any children or vulnerable elderly people residing on the property; and his response to the options extended to him; or whether a warrant of execution against movable property had been issued and to furnish this court with a return – even if it were a *nulla bona.*

7. There are two insurmountable problems in this matter. The first is whether this court can overlook the provisions of Rule 46(1)(a)(i). The applicant, in its papers has ignored this rule. In argument it was submitted that the plaintiff were entitled to proceed with the execution against the immovable property, having been declared executable. My considered view is that this argument disregards the express peremptory provision of the rule even if the immovable

property may have been declared executable which is not the case in this matter.

8. Further, Rule 46(1)(a)(i) is peremptory even where an order has been granted declaring the immovable property executable. Where the property is the primary residence of the judgment debtor the Court is enjoined to first consider "*...all relevant circumstances...*". Section 26(3) of the Constitution likewise obliges a court to 'consider' all "*...relevant circumstances...*" before a person may be evicted from his home.

9. The applicant's attempts as set out in the affidavit of Sabashnee Naidoo, does not go far enough to satisfy this court that all relevant circumstances have been placed before this court. It was clearly within the means and ability of the applicant to ascertain the particulars of the occupants of the mortgaged property including their ages and whether any of them are incapacitated and the hardships, if any, that such persons may be exposed to.

10. Further, and without suggesting in any way that the position of the occupants of the mortgaged property in this case is comparable with that of illegal squatters who fall under the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act No. 19 of 1998 (PIE), the court has grave reservations in authorising the issuing of a warrant of ejectment where those who will be ejected may be totally impecunious and incapable of securing alternative accommodation without invoking the intervention of either the local Municipality or Provincial Department of Housing. It is difficult to conceive of a situation where alternative accommodation may be provided to an illegal occupant in terms of PIE and the possible needs of children, elderly or disabled persons, if any, are not considered by the court and a litigant such as the applicant which has all the means without being seriously compromised financially or otherwise fails to place the court in possession of easily verifiable facts. This court is constitutionally obliged to weigh all the factors mentioned above in determining whether to grant the relief sought. Having done so it is my considered view that the applicant has not placed all the facts reasonably within its knowledge or which can be easily verifiable by it to enable this court to exercise a judicious discretion.

11. **The application is accordingly refused. There will be no order as to costs.**

G. Webster

G. WEBSTER

JUDGE IN THE HIGH COURT

Date of Hearing	:	24 June 2013
Counsel for the Applicant	:	Adv. U Lottering
Instructing Attorneys	:	Hack Stupel & Ross Attorneys Pretoria