FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

CASE NO: 2017/2011

In the matter between:

NEDBANK LIMITED **Applicant**

and

SOUTH AFRICAN SECURITISATION PROGRAMME (PTY) LTD **First Respondent**

PAKISA DEVELOPMENTS (PTY) LTD **Second respondent**

THE REGISTRAR OF DEEDS, BLOEMFONTEIN **Third Respondent**

SIMON KHOLELA MASEKA **Fourth Respondent**

SIBONGILE SOPHLITHI MASEKA **Fifth Respondent**

HEARD ON: 25 APRIL 2013

JUDGMENT BY: MHLAMBI, AJ

DELIVERED ON: 11 JULY 2013

INTRODUCTION:

[1] The Applicant seeks an order:

[1.1] Compelling the First Respondent to instructthe Third Respondent to uplift an interdict registered by the Third Respondent at the instance of the First Respondent against the deed of an immovable property registered in the name of the Fourth and the Fifth Respondents being at 925, Welkom Extension 1, District Welkom, Free State Province("the property"),

[1.2] Should First Respondent fail to act in accordance with prayer one above, Third Respondent be directed to register the transfer of the property from the Fourth and Fifth Respondents to the Second Respondent.

[1.3] First Respondent be ordered to pay the costs of the application.

[1.4] Second, Third, Fourth and Fifth Respondents be ordered to pay costs only in the event of their opposing the application.

[1.5] Further and or alternative relief.

[2] **<u>BACKGROUND AND POINTS THAT ARE COMMON CAUSE</u>**

The above are succinctly set out in the grounds provided by the First Respondent in terms of Rule 6(5)(d) (iii) of the Uniform Rules as follows:

[2.1] On 19 April 2005, 16 September 2005 and 25 October 2005, the applicant concluded a written loan agreement with the Fourth and Fifth Respondents in terms of which the applicant lent and advanced to the Fourth and Fifth Respondents respectively the amounts of R350 000.00, R200 000.00 and R215 000.00;

[2.2] As security for the due fulfilment of obligations of the Fourth and Fifth Respondents towards the applicant pursuant to the conclusion of the aforesaid loan agreements, the Fourth and Fifth Respondents caused for three respective mortgage bonds to be registered in favour of the applicant, that being bond numbers B20404/2004, B18904/2005 and B24564/2006;

[2.3] The Fourth and Fifth Respondents breached the agreements in that they failed to maintain payments of the monthly instalments;

[2.4] On 25 November 2011 the applicant, Fourth and Fifth Respondents concluded a written agreement or deed of settlement pursuant to an action instituted by the applicant against the aforesaid respondents under case number 6098/2010;

[2.5] In terms of the settlement agreement, the Fourth and Fifth Respondents consented to judgment and were provided with an opportunity for a period of three months to sell the immovable property by way of private treaty for an amount equal to the outstanding balance owed to the applicant;

[2.6] In the event of the Fourth and Fifth Respondents failing to sell the property by private treaty on or before the expiration of the three month period, the applicant would be entitled without any further notice to the Fourth and Fifth Respondents to sell the immovable property by way of sale in execution, alternatively, a public auction to the highest bidder.

[2.7] The Fourth and Fifth Respondents provided the applicant with an irrevocable power of attorney to sell the property according to its own discretion at a sale in execution alternatively a public auction to the highest bidder;

[2.8] The Fourth and Fifth Respondents were unable to sell the property by way of private treaty prior to the expiration of the deadline;

[2.9] The immovable property was then sold on 6 June 2012 at a public auction for an amount of R700 000.00;

[2.10] On 6 June 2012 the Fourth and Fifth Respondents provided a special power of attorney to attorney Theunis Johannes Nel, a director of the firm Maree Gouws Incorporated Attorneys, to take all such stepsas are necessary toensure that transfer of the ownership in respect of the immovable property was registered in favour of the purchaser.

[2.11] The transfer could not be finalised as the First Respondent had registered an interdict over the immovable property in the Deeds Office;

[2.12] The First Respondent had obtained judgment against the Fourth Respondent under case number 2017/2011 whereafter an interdict was registered against the title deed of the immovable property in favour of the First Respondent;

[2.13] A written request was addressed to the First Respondent's Attorneys of record on 20 September 2012 requesting that the First Respondent allow the interdict to be uplifted, thereby ensuring that the transfer could be finalised;

[2.14] On 25 September 2012 the First Respondent, through its attorneys, communicated to the applicant's attorneys its unwillingness to agree to the upliftment of the interdict;

[2.15] The amounts owed by the Fourth and Fifth Respondents towards the First Respondent remain outstanding.

[3] **ISSUES TO BE DETERMINED**

Whether the Applicant has:

[3.1] **Locus Standi** to bring the application

[3.2] Made out a case for the relief sought.

[4] **CONTENTIONS BY THE PARTIES**

The Applicant contends that:

[4.1] The settlement agreement which was made an order of the Court on 25 November 2011 declared the property specially executable in favour of the Applicant and that the Order pertinently authorises the Applicant to sell the property by public auction should Fourth and Fifth Respondents fail to sell it by 25 February 2012.

[4.2] The Applicant was entitled to sell the property to satisfy the judgment as it is both a secured and preferent creditor while the First Respondent is but a concurrent creditor,despite the judgment granted in his favour as against the Fourth and Fifth Respondents.

[4.3] The Applicant is the only *persona*with rights to deal with the property and therefore having *locus standi*to bring the application which is the only remedy available to it.

[4.4] First Respondentresists the application for the following reasons:

[4.4.1] The Applicant has no *locus standi*to bring the application. Only the Fourth and Fifth Respondents have the necessary *locus standi*to take appropriate steps in regard to the property.

[4.4.2] No creditor can, in law, seek an order compelling another creditor to abandon its rights arising from the attachment of the property and instruct the Registrar of Deeds to uplift the interdict.

[4.4.3] By being a secured creditor does not imbue the Applicant with the necessary *locus standi*, but determines the privileged position the Applicant will hold in the event of the distribution of the proceeds after the sale of the property.

[4.4.4] Applicant failed to make out a case in his founding affidavit and the allegations in his replying affidavit should be struck out.

[4.4.5] The order obtained in the Magistrates Court entails no more than that the Applicant is excused from levying execution against Fourth and Fifth Respondents movable property.

[4.4.6] The Applicant has misconstruedits remedies.

[4.4.7] The Fourth and Fifth Respondents cannot seek an order that the agreement of sale should take precedence over an attachment of the property in terms of the Rules of Court.

[4.4.8] Fourth and Fifth Respondents had no right to sell the property which was judicially attached which had to be dealt with in accordance with Rule 46 of the Uniform Rules.

EVALUATION

[5] First Respondent did not file an opposing affidavit but a Notice in terms of Rule 6 (5) (d) (iii) raising the two issues that the Applicant had no *locus standi*to bring this application and that no case in law was made out for the relief sought.

[6] In support of its case to prove *locus standi,* Mr Cilliers, on behalf of the applicant, referred to **IvoralProperties (Pty) LTD v Sheriff, Cape Town andOthers**, 2005 (6) SA 96 (CPD) at 113 G-J and **Standard Bank of South Africa Ltd v Saunderson and Others**,2006 (2) SA 264 (SCA) at 269 D-Eand argued that the Applicant is entitled to satisfy the judgment by selling the property.This interpretation of the law is correct.

[7] In the **Ivoral Case**, *supra***,** it was stated in paragraph 50

> "it is axiomatic that a judgment or order *ad pecuniamsolvendam*is an indispensable prerequisite for the issuing of a writ of execution. A judgment creditor who has obtained a judgment or order sounding in money is in law entitled to procure satisfaction thereof by electing to invoke any of the procedures recognised by the Supreme Court Act the Uniform Rules of Court and the common law as a form of execution. Relief declaring immovable property executable entails no more than that a judgment creditor who elects to obtain satisfaction of a judgment debt by means of execution against the judgment debtor's immovable property is excused from levying

> execution against the judgment debtor's movables first………. but merely a request for a direction with regard to the execution of a judgment, which although claimed summarily and simultaneously, in essence, is ancillary thereto".

[8] In countering the argument Mr van Reenen, on behalf of the First Respondent, submitted that there was no authority that the Applicant, as a secured creditor of the Fourth and Fifth Respondents, had acquired the necessary *locus standi*to enforce the sale transaction. Its security simply means that whateveramounts are realised in respect of the sale of the property will be distributed to the Applicant First.

[9] Similarly, even if the settlement agreement may have been made a Court Order, it did not provide the applicant with the necessary *locus standi* in respect of the present application. It does not place the Applicant in the shoes of the judgment debtor being the Fourth and Fifth Respondents.

[10] In paragraph 15.1, page 18 of the Founding Affidavit, the Applicant confirmedthat Fourth and Fifth Respondents were the sellers of the property as per the conditions of sale that applied to the public auction and they duly signed the saleagreement as such.

[11] In terms of the paragraphs 23.2 and 23.4 on page 29, Applicant stated that both Fourth and Fifth Respondents were compelled to effect transfer of the property to the Second Respondent as sellers and consequently entitled to the relief sought to enable them to fulfil their contractual obligations.

[12] Paragraph6.9 on page 231 of the Replying affidavit reads as follows:

> "Die Vierde en Vyfde Respondente het formaliteitshalwe as die geregistreerde eienaars die koopaanbod- dokument gedateer 31 mei 2012 geteken".

[13] In Paragraph 6.19 on page 233 of the same Replying Affidavit it is stated that the Fourth and Fifth Respondents had no further rights to deal with the property after 25 February 2012.

[14] This elicited a sharp rebuke from Mr Van Reenen who stated in his Heads of Argument that the Applicant sought to make out a completely new case in Reply, which directly contradicted its allegations in its founding papers and thatsuch allegations in the replying affidavit stood to be struck out. I agree with this view. The Applicant must stand and fall by itsfounding affidavit.

[15] Mr Van Reenen argued further that even if the allegations in reply were taken into account, given that the property was purportedly sold at a public auction without resorting to the prescribed execution process and the involvement of thesheriff, the Fourth and Fifth Respondents were the persons with the necessary*locus standi* to take any further steps with regard to the property. I agree withthis view. The Fourth and Fifth Respondents played a role and were not merelybrought onto the scene by reason of the foreclosure.

[16] They controlled thecourse of events and in fact took part in the formulation of the sale. See **Sedibe v United Building Society**1993 (3) SA 671 (T) at 675 H-J.

[17] Mr Cilliers argued that the property was declared specially executable when the settlement agreement was made an Order of Court. The reference to **Saunderson**,*supra*, does not advance the Applicant's argument any further.The approach in **Saunderson** was ventilated fully in **Gundwana v Steko andOthers** 2011(3) SA 608 (cc)paras 42-49.

[18] In counter-argument, Mr Van Reenen correctly said that the applicant failed to provide the Court with a copy of the Magistrate's Court Order. Referring to theprovisions of the Magistrate's Court Rule 27 he submitted that the settlement agreement did not make provision for it

to be made an Order of Court as provided by the rule. It only provided for the fulfilment of future conditions.

[19] Consequently, the Magistrate acted *ultra vires*if it made the settlement an order as contended.

[20] Furthermore, if the property were declared specially executable as contended by the applicant in reply, then the entire case in its founding papers must fail as the sale by the Fourth and Fifth Respondents would then be a nullity as the Applicant would have been obliged to follow the prescribed execution process in terms ofRule 43 of the Magistrate's Court Rules. See **Mattoida Construction (SA) (Pty)LTD v E Carbonari Construction (Pty) Ltd**1973 (3) SA 327 (D) at 332 A-B. Iagree with this view.

[21] Section 66 (1) (a) of the Magistrate's Court Act provides that a judgment for the payment of money shall be enforceable against the judgment debtor's immovable property when the Court, on good cause shown, so orders. See **Jafta v Schoeman and Others Van RooyenScholtz and Others**2005 (2) SA 140 (cc);Rule 46 of the Uniform Rules of Court; **Mkhize vUmvoti Municipality and Others**2012 (1) SA 1 (SCA) at page 15 paras 26-28.**Jafta**, *supra,* set out the relevant circumstances that the Court shouldconsider whether or not to declare a natural person's primary residencespecially executable.

[22] The Applicant is not without a remedy. Two possibilities were made by Mr Van Reenen:

(i) Applicant should apply for the setting aside of the attachment of the property.

(ii) Being armed with a Court Order, the Applicant should harness the legal process of execution to attach the property and enjoy the rights afforded by the provisions of Rule 46.

CONCLUSION

[23] Both Applicant and First Respondent have mortgages over the property;the First Respondent having a judicial mortgage in the form of a *pignusjudiciale*.The effect of a *pignusjudiciale*or attachment in execution, is to give a judgment creditor a preference on the proceeds of the sale of the property attached as against the other creditors of the debtor save (1) those who have a prior effective security over such property, and (2) other judgment creditors who lodge writs of execution, with the proper officer, within a specified period after the original attachment. See Mortgage and Pledge, pages 60 and 70. Therefore the Applicant's position, whichever way it can be viewed, ranks superior to the other creditor.

[24] However, the relief sought by the Applicant as the application stands, cannot be entertained and therefore stands to be dismissed.

COSTS

[25] In the result, costs should follow the event.

ORDER

[26] The application is dismissed with costs.

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J.J. MHLAMBI, AJ

On behalf of applicant: Adv H.J. Cilliers
Instructed by:
Hill McHardy&Herbst Attorneys
BLOEMFONTEIN

On behalf of first respondent: Adv W.H.J. van Reenen
Instructed by:
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