FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No: 794/2012

In the matter between:-

MADISEBO FRANCINAH MOKHARUMETSO	Applicant
and	
FIRST RAND BANK LTD (Formerly known as FIRST NATIONAL BANK OF SOUTHERN AFRICA LTD)	1st Respondent
HASAN ABUARJA	2nd Respondent
REGISTRAR OF DEEDS-FREE STATE	3rd Respondent
THE SHERIFF FOR THE HIGH COURT WELKOM	4th Respondent

JUDGMENT BY: MHLAMBI, AJ

HEARD ON: 25 MAY 2012

DELIVERED ON: 11 OCTOBER 2012

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[1] The Applicant approaches the Court on Motion for an order in the following terms:-

1. That the **WRIT OF EXECUTION** against the immovable property issued by the Registrar of the above Honourable Court under **Case No. 3762/2007** on the strength whereof that the Sheriff sold **Erf 9 Flamingo Park, district WELKOM**, also known as **No. 4 Brebner Street, WELKOM, PROVINCE**

FREE STATE be declared null and void and/or unlawful and set aside;

2. That the purported Sale in Execution on **30th November 2011** under the same **Case No. 3762/2007** of the aforementioned property, that was allegedly attached in terms of the abovementioned Warrant of Execution and Notice of Attachment, together with all subsequent sales of such property thereafter be declared null and void and/or unlawful and set aside;

3. Interdicting and prohibiting the registration by the Third Respondent (REGISTRAR OF DEEDS) of the pending transfer from the Applicant to the Second Respondent and/or to any other person of the property known as **Erf 9 Flamingo Park, district of WELKOM, PROVINCE FREE STATE**. Alternatively directing the Third Respondent to register the Applicant as owner of a property known as **Erf 9 Flamingo Park, district of WELKOM, PROVINCE FREE STATE**, alternatively, granting Applicant leave to recover ownership of the said property by way of a restitution intergrum or otherwise, and thereafter to register ownership with the Third Respondent;

4. Interdicting and prohibiting the First Respondent, (FIRST RAND BANK LTD) from cancelling **Bond Number 8146/2007** registered over **Erf No. 9 Flamingo Park, district of WELKOM, PROVINCE FREE STATE** in the name of the Applicant, alternatively, directing the Third Respondent to re-

register a Bond in favour of the Second Respondent over **Erf No. 9 Flamingo Park, district of WELKOM, PROVINCE FREE STATE** under the same terms and conditions;

5. Declaring that the First Respondent and those of the Respondents who oppose this Application bear the costs of the Application jointly and severally, the one paying the others to be absolved;

6. Further and/or alternative relief.

The application is opposed only by the first Respondent.

[2] **FACTUAL BACKGROUND**

2.1 During or about **January 2007**, the applicant was granted a Home Loan by the 1st Respondent, which loan was secured by a mortgage bond.

2.2 By **17 April 2007**, less than 3 months after commencing repayments, the Applicant had already fallen into arrears in the amount of **R4 593.22** which had grown to R16 282.16 by 3 July 2007 when the first Respondent issued a notice in terms of section 129 of the National Credit Act.

2.3 By **3 July 2007**, the arrears had grown to **R16 282.16** and the 1st Respondent issued a notice in terms of **Section 129 of the National Credit Act**.

2.4 The applicant failed to respond to the notice and summons was issued.

2.5 The applicant did not enter appearance to defend and on **11 September 2007**, default judgment was granted by the Registrar.

2.6 The default judgment included an order declaring the property in question executable.

2.7 A warrant of Execution against immovable property was issued on **18 September 2007**.

2.8 During **September 2007** when the default judgement and Warrant of Execution was obtained, the applicant would have been about **R18 000.00** in arrears – more than 3 full monthly instalments.

2.9 The first sale in execution was arranged for **14 November 2007**, but was cancelled due to payment of **R14 000.00** and **R8 000.00** by the applicant on **13** and **14 November 2007**.

2.10 Afterwards, the Applicant repeatedly fell into arrears, resulting in further sales in execution being arranged and cancelled due to payments by the Applicant.

2.11 The property was eventually sold to the 2nd Respondent at a sale in execution, held on **13 November 2011**.

2.12 On 12 January 2012 Applicant received an application for eviction from the Second Respondent and such application is a subject of other court proceedings.

APPLICABLE LAW

[3] **Rule 46 (1)** of the Uniform Rules provides as follows:-

> "(1)(a) *No writ of execution against the immovable property of any judgment debtor shall issue until —*
>
> *(i) a return shall have been made of any process which may have been issued against the movable property of the judgement debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or*
>
> (ii) *such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of* **Rule 31(5**)*, by the registrar:* ***Provided 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 amendment became effective from **24 November 2010**.

This invokes the provisions of **Section 26 of the Constitution**, which provide that:

> ***"(1) Everyone has the right to have access to adequate housing.***

(2) ……………………..

(3) No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

"Suffice it to note that execution upon judgment on a money debt generally took place against movable property first, and upon immovable property only if there was insufficient realisable movable property to satisfy the judgment. Initially the practice was that the court had to be approached for an order declaring immovable property executable when movables were insufficient to satisfy the debt, but this practice was soon discontinued. The practice of ordering immovable property specially executable at the time of judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables where immovable property had been specially hypothecated as security for the debt.

The underlying basis for the lack of judicial control over the whole process of execution was that it was an '**executive matter which is dealt with by the Registrar'.**"

GUNDWANA v STEKO DEVELOPMENT AND OTHER 2011 (3) SA 608 CC. In this case, the registrar's power under the previous Rule 45(1) to declare mortgaged property which is a debtor's primary residence executable, was declared unconstitutional.

"*The judicial process, guaranteed by Section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That* *protection extends to the circumstances in which property may be seized and sold in execution*"

CHIEF LESAPO v NORTH WEST AGRICULTURAL BANK AND ANOTHER 2000 (1) SA 409 CC.

On the appropriateness of judicial oversight of the execution process, **Mokgoro J** expressed herself as follows:

> *"Even if the process of execution results from a default judgment the court will need to oversee execution against immovable property. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."*

JAPHTA v SCHOEMAN AND OTHERS; VAN ROOYEN v STOLZ AND OTHERS 2005 (2) SA 140 (CC).

[4] The learned Judge goes further and states:

> *"If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests*

<u>of the judgment debtor in security of tenure in his or her home particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless</u>.

It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case."

"In summing up, factors that a court might consider, but to which a court is not limited, are:

The circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court."

"*Bondholders who wish to execute on a mortgage bond must first approach a court of law for it to make a proper determination as to whether the sale in execution of a person's home is justifiable in the circumstances of the case*"**. <u>GUNDWANA</u>,** *supra*.

"*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*," Quoting **Mokgoro J** in Japhta ***supra*****, Froneman J** goes on to say

> *"Mindful of that warning, I would merely add the following. 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."*

[5] Having declared the High Court Rules and practice, allowing the registrar to grant orders declaring immovable property that is a person's home executable, constitutionally invalid, the Court (in **GUNDWANA**) then expressed itself as follows:

> "*The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in* ***Menqa*** *and* ***Another v Markom and Others 2008 (2) SA 120 SCA****. A similar approach should be followed here."*

"In **Menqa** it was held that sales in execution of immovable property (and subsequent sales) were invalid if the warrant of execution pursuant to which the sales had taken place had been issued by the clerk of the magistrate's court without judicial supervision, and the absence of this procedural safeguard imperilled a party's **Section 26(1) Constitutional Rights**, even if they occurred prior to the Jaftha case (**supra**), and could not be saved by an application of **Section 70 of the Magistrate's Courts Act."**

(Paragraphs [21-22] at 128H – 129D.)

[6] It was held further in **MENQA** that,

"If a sale in execution was null and void because it violated the principle of legality, the sheriff had no authority to transfer ownership to the purchaser, who would therefore not acquire ownership despite registration of the property in his or her name. On the facts the first respondent was theoretically entitled to recover the property in vindicatory proceedings."

(**Paragraphs [24]-[25] at 129G-130D.**)

"It was held further on the facts, that directing the Registrar of Deeds to re-register the property in the first respondent's name would not take into account what the first appellant had paid for the property and the first respondent's possible unjust enrichment."

(**Paragraph [25] at 130E**.)

[7] Further, **Section 70** should not be interpreted as protecting a sale which is void, as this conflicts with the basic principle of legality and **Section 25 of the Constitution. (Paragraphs [46] at 141D – E and 142B – D.)**

<u>CONTENTIONS BY THE PARTIES</u>

[8] Applicant seeks to overturn the writ of execution on the basis that:-

(i) There was no compliance with Rule 46.

(ii) No warrant against the Applicant's movable property was issued or sought.

(iii) The property was not declared executable by a competent Court.

[9] The Respondent on the other hand argues strongly that the application should fail on the following grounds:

1. There was no reviewable irregularity in the obtaining of the warrant;
2. The Applicant has failed to comply with any of Froneman J's directions in the Gundwana matter in that :-
   a) There was no application for rescission;
   b) There was no explanation for failing to apply for rescission from September 2007 to date;
   c) There was no disclosure of any bona fide defence to the 1st Respondent's claim;
   d) The Applicant failed to allege or show that the court, with full knowledge of all the relevant facts existing at the time of

granting default judgment would have refused leave to execute.

3. The Applicant had not placed any facts before the court to justify protection under section 26 (1) of the Constitution.
4. Had the 1st Respondent approached the court under Rule 46 (1) as it stands today, any court would have been willing to declare the property executable.
5. The Applicant had advanced false and misleading statements in his affidavit.

EVALUATION

[10] It must be stated from the outset that in the light of the submissions made on behalf of the Applicant, she:

i) Seeks no rescission of judgment.

ii) Consequently she has, obviously offered neither an explanation for her failure to do so nor disclosed a bona fide defence to the Respondent's claim.

[11] The cardinal question that arises is: Should the application therefore fail in the light of Mr Johnson's argument that there was no compliance with the directions of Froneman J in **GUNDWANA?** In other words, should a debtor in the shoes of the Applicant always approach Court with an application for the rescission of judgment as a first step even where he/or she only feels aggrieved by the sale and accept the judgment. If the answer is in the affirmative, then the application must fail. If not, what next?

[12] In **<u>GUNDWANA</u>,** *supra*, the learned Judge went further to say:

> "In order to turn back the clock….aggrieved debtors will first have to apply for the original default to be set aside….it may be that in many cases those aggrieved may find these requirements difficult to fulfil". In giving direction to individual persons who needed to approach the courts to have the sales and transfers set aside if granted by default, the learned Judge said that **Menqa,** supra, served as guidance. I am therefore of the view that Applicants may approach Court with an application for the stay of the warrant and subsequent sale without having to apply for the rescission of judgment. See also the unreported decision of this Court as per Jordaan J in M.G. Keikelame & Others v Wilson Thoabala & Others case number 1267/2010 dated 17 November 2011; paragraphs 15-22 on page 5."

[13] It was argued on behalf of the First Respondent that had he approached the Court under Rule 46(1) as it stands today, any Court would have been willing to declare the property executable.

[14] It is clear from the papers and Applicant's uncontested statements that she had sufficient movable property as at the time of judicial attachments whereupon First Respondent could attach for settlement or utilise as further security for the debt. In paragraphs 4.12 and 4.16 of the Founding Affidavit, she mentions amounts of R900 000.00 (nine hundred thousand rands) and R201 101.81, being progress payments due to her for services rendered. Such payments had not, as yet, realised. The first amount was subject to litigation between her and a sub-contractor and had been paid into

an Attorney's Trust account pending finalisation of the matter. The surplus on payment would, according to her, be used to settle the debt. I am therefore of the view that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would have refused leave to execute.

[15] Counsel for first Respondent requests in his heads that, should further proof of the allegations in paragraph 13 of the opposing affidavit be required, leave is sought to file a supplementary affidavit. This affidavit would address the veracity of the arrangements entered into between Applicant and the First Respondent and that indeed such sales in execution were arranged and cancelled. For purposes of this judgement, I do not find this step to be necessary. On perusal of Amelia du Buisson's affidavit the following became apparent:

1 First Respondent was on or before 25 May 2011 uncertain as to the validity of the warrant of execution as a consequence of which it was cancelled shortly before the sale. First Respondent had then proceeded to enrol an application for confirmation of the warrant of execution which was issued against the property.

2. Instead of finalising the confirmation of such warrant, a next sale in execution was accordingly scheduled for 27 July 2007. Instead of proceeding with the sale, an alleged "quick-sell mandate" was signed by Applicant in terms of which First Respondent would proceed to market the property in the open

market in an attempt to obtain the best price therefor. I should hasten to say that neither in the Heads of Argument nor in the oral argument did First Respondent address this point; despite the Applicant having denied in her answering affidavit to ever having signed such document. It would appear that the sale of the 27th of July was therefore cancelled or not proceeded with as a result of this document.

3. On the expiry of the so-called "quick-sell mandate" on October the 20th 2011, the property not having been sold, a further sale in execution was arranged and the property was sold on the 13th of November 2011.

4. The Deponent alleges that the First Respondent duly complied with the remainder of the provisions of Rule 46, and the property was sold to the Second Respondent for the amount of R10 000 (Ten thousand rands). The reason for the very low purchase price, is that the arrear rates and taxes on the property amounted to R173 385.76 (One hundred and seventy three thousand three hundred and eighty five rand and seventy six cents).

I have difficulty with this attitude. Nowhere in argument or otherwise, was it First Respondent's case that there was compliance with Rule 46. If indeed there was compliance, this matter would not have served before court. In fact, according to her, the matter was enrolled, but apparently never proceeded with. I find First Respondent's change of heart strange in that, approximately three weeks after the quick sale document expired. First Respondent, who was in the process of attempting to obtain the best price for the Applicant for the property, suddenly puts it up for sale.

5. In paragraph 14 of her affidavit she then states

> "It is as such evident that the First Respondent went out of his way for a period of approximately 5 years to accommodate the Applicant and to assist her in retaining the immovable property".

In **GUNDWANA**, *supra*, Froneman J states:

> "The voluntary placing-at-risk also runs into difficulty. It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee, and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that –
>
> (a) The mortgage debt may be enforced without court sanction;
> (b) She has waived her right to have access to adequate housing or eviction only under court sanction of section 26(1) and (3); and
> (c) The mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith?
>
> I think not.
>
> If authority is needed that self-help is inimical to the rule of law, **LESAPO** is that authority. It is also authority that execution upon property in respect of a mortgage debt without court sanction, is not allowed."

[16] It is therefore clear that on this ground too the application must succeed.

In **ABSA v NTSANE AND ANOTHER** 2007 (3) SA 554 TPD at 563 I-J, the Court says:

> "From the registration of the bond over the property it is clear that the Defendants did not receive any state assistance to purchase their home.
>
> Given this history and somewhat erratic pattern of payments made by the Defendants, the presumption referred to above that the bonded property is the Defendants' first home appears to be reasonable."

COSTS

[16] In light of the above I am of the opinion that costs should follow the event.

ORDER

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

1. Prayers 1 and 2 are granted.
2. The first part of prayer 3 is granted insofar as third Respondent is interdicted and prohibited from registering the property mentioned in prayer 1 to the Second Respondent.
3. First Respondent to pay costs.

J. J. MHLAMBI, AJ

On behalf of Applicant:	Adv. Instructed by: BLOEMFONTEIN
On behalf of Respondent:	Adv. Instructed by: BLOEMFONTEIN