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

Case No. 49134/2013

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 15 May 2024

SIGNATURE:

In the matter between:

FELIX, JOSE AMERICO GONCALVES

1st APPLICANT

FELIX, MARIA JUDITE PESTANA

2ND APPLICANT

And

NEDBANK LIMITED

1ST RESPONDENT

SHERIFF OF THE COURT

2nd RESPONDENT

Coram: Millar J

Heard on: 14 May 2024

Delivered: 15 May 2024 - This judgment was handed down electronically by

circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09h00 on 15 May 2024.

ORDER

It is Ordered:

- [1] The application is dismissed.
- [2] The applicants are ordered to pay the first respondent's costs of the application on the scale as between attorney and client.

JUDGMENT

MILLAR J

- [1] This is an application brought by way of urgency by the applicants in order to interdict the sale of Erf 3[...] B[...] Township by the sheriff of the court on 15 May 2024. The applicants are the registered owners of the property who have been involved in protracted litigation with the first respondent (Nedbank) since 2013 when they fell into arrears with the payment of the mortgage bond that they had registered in favour of Nedbank over the property.
- [2] The premise of the application is that there is presently an application for reconsideration by the President of the Supreme Court of Appeal against the refusal by that Court of an application for leave to appeal relating to matters between the applicants and Nedbank.

[3] It is common cause between the parties that on 28 July 2014, a judgment was granted against the applicants for the outstanding balance on the mortgage bond in consequence of arrears together with an order declaring the property executable. The applicants appealed this order to the Full Court of this division and on 28 February 2017, the appeal was partially successful insofar as the executability of the property was set aside. The monetary judgment was only partially altered on appeal ¹ and the liability of the applicants for payment of a substantial sum of money was unaffected by the appeal and is still extant.

[4] The Full Court held in regard to the executability that:

“On the applicants claim for the respondent’s property, Erf 3[...] B[...] Township, to be declared specially executable, the order is one of absolution from the instance.”

[5] Nedbank approached the Court again having brought a new application, which was now supplemented to include the requirements prescribed by rule 46A which had since come into operation. This was to have the immovable property declared executable. This application was heard on 27 January 2020 and in consequence thereof, an order was granted declaring the property specially executable.

[6] On 13 August 2020, some 7 months later, the applicants applied for leave to appeal against the order granted on 27 January 2020. In the absence of an application for condonation for the late application, Nedbank, in response, brought an application in terms of Rule 30A to have the notice of application for leave to appeal set aside. This application was heard on 17 February 2022 and

¹ The Full Court replaced the order of the Court a quo that the applicants pay R2 374 273.12 with the following order: *“The amount of the judgment was confirmed by the Full Court in the sum of R2 600 059.00 provided however that the indebtedness of the 2nd applicant was limited to R1 800 000.00 together with such further sum or sums for interest, charges and costs including costs on an attorney-client scale as shall from time to time have accrued or become due and payable thereon.”*

an order was granted ordering the applicants to withdraw the application for leave to appeal the order of 27 January 2020 failing which their application for leave to appeal would be *"ipso facto struck"*.

- [7] On 21 February 2022, the applicants acquiesced and delivered a notice of withdrawal of the application for leave to appeal. A year later, on 14 February 2023, Nedbank then proceeded with a writ of execution against the property. This was served on the first applicant personally and precipitated 2 days later on 16 February 2023 another application for leave to appeal which in turn caused Nedbank to deliver a new application in terms of Rule 30A.
- [8] In August 2023, the applicants then launched an urgent application to interdict the sale of the property. This application was heard and dismissed with costs on 12 September 2023. Application for leave to appeal this dismissal was refused as was a subsequent application for leave to appeal to the Supreme Court of Appeal. There is presently an application pending before the President of the Supreme Court of Appeal for reconsideration of the refusal by that court to grant leave.
- [9] Neither the monetary judgment nor the order declaring the property executable are the subject of any application for leave to appeal. The leave to appeal upon which the applicants have premised the present application is against the dismissal of an urgent application to interdict the sale of the property from proceeding.
- [10] Notwithstanding that the applicants received notice of the sale scheduled for 15 May 2024 on 8 April 2024, there is no acceptable explanation for why this application has been brought at the proverbial eleventh hour. The applicants state in this regard:

"Primary to urgency in this matter is the fact that the decision by the First Respondent to proceed with the auction sale is illegal and in direct contravention of Section 18(1) of the Act such that any sale that may arise

from it will be void ab initio and a fraud perpetrated to whomsoever will be an innocent auction purchaser at the scheduled (sic) auction. The court cannot simply wait and watch where innocent members of the public of defrauded by being blindly put to an illegal process at great financial costs to them.”

[11] The applicants waited from 8 April 2024 to 22 April 2024 before making a request of Nedbank that they do not proceed with the sale. There was no response from Nedbank and thereafter on 25 April 2024, they threatened the present application which was only brought on 2 May 2024.

[12] For Nedbank’s part, it denies that the application is urgent and asserts, as is set out above, that the pending application before the President of the Supreme Court of Appeal, being in respect of the dismissal of an interdict, has no bearing on the present sale and confers no right upon the applicants to the interdict that they now seek.

[13] Nedbank goes further. In its answer, it asserts that the last time any payment was made by the applicants towards their indebtedness was the sum of R20 000.00 on 13 August 2014 and that *“the applicants conduct is nothing short of deplorable, and this urgent application is yet another ploy designed to delay and frustrate the first respondent’s enforcement of the credit agreements.”* In other words, the applicants have lived in the property without making any payment towards it for almost a decade. This conduct follows upon that which was observed by the Full Court when it held:

“So the appellants have lived in the property for over two years at the expense of the Bank. There is not a bottomless pit of funds available to the reputable banking sector for loans to aspiring homeowners. New loans can only be granted if banks obtain fresh capital for this purpose or deploy the funds paid by existing mortgagors towards the reduction of their indebtedness’s. Mortgagors who do not pay their loans as they fall due

prejudice the entire corpus of aspiring homeowners because their failure to pay reduces the funds available for new entrants into the home ownership market, i. e, by and large young people who are trying to make their way in life”.

[14] In essence, it is the case for Nedbank that the applicants have abused the legal process to frustrate the enforcement of an extant judgment. From the history of the matter, it is quite clear that the applicants and in particular the first applicant, are unable to accept responsibility for the discharge of their obligation to Nedbank. It was not placed in dispute that the amount now due to Nedbank is R4 387 933.04.

[15] The attitude of the first applicant to both Nedbank and its representatives is expressed by him as follows:

“The sole and proximate cause for this so called “long and chequered history” is incompetence on the part of the First Respondent’s attorneys who failed to do the very most basic of matters any lawyer representing a commercial bank is expected to have mastered. This incompetency was met with my ability to understand the process of this court as well as substantive law relating to foreclosure proceedings, the impact of finding of absolution from the instance and the impact of section 18 of the Superior Courts Act, (No 10 of 2013) on execution of judgments that are subject to appeal.”

[16] To my mind, the fact that there have been no payments over the last 10 years coupled with applications for leave to appeal every time Nedbank seeks to enforce the judgment on the part of the applicants is indicative of litigants who have persistently and without any basis used and abused the process of this court for the sole purpose of escaping liability for a debt in circumstances where there is absolutely no merit in any of the legal processes that they have initiated in doing so.

- [17] The attempt to ground an interdict on the application presently before the President of the Supreme Court of Appeal is corroborative of this. It was argued for the applicants that because the Full Court had granted absolution from the instance in respect of the order for executability in 2014, that the application brought by Nedbank in 2020, under the same case number and supplemented to fulfil the requirements of Rule 46A was in fact a nullity. On the basis of this argument, the order of 27 January 2020 was *void ab initio* as was everything that followed it because there could only be compliance with the order of the Full Court if an entirely new proceeding had been instituted.
- [18] This argument is in my view meritless. Once there is a judgment, any order granted pursuant to execution is ancillary to that judgment. The order of the Full Court properly construed was that Nedbank had failed to make out a case to have the immovable property specially executable at that time – not that that order of absolution would vitiate the judgment and require the institution of proceedings *de novo* for both the monetary judgment and an order for executability.
- [19] Besides the fact that the order of the Full Court is clear in its terms, the interpretation contended for by the applicants is simply not in keeping with the ordinary meaning of the order and is nothing more than a contrived and self-serving interpretation proffered with the purpose of further frustrating Nedbank's execution of its order.
- [20] For the reasons set out above, I find that the applicants have failed to make out a case for the granting of an interdict for the sale of the property on 15 May 2024 at 10h00.
- [21] In regard to costs, these should follow the result. I was urged by counsel for Nedbank to grant a punitive order for costs on the scale as between attorney and client as this is what the credit agreement between the applicants and

Nedbank provided for. In view of the manner in which the applicants have conducted themselves, I am of the view, that as a mark of this court's displeasure, a punitive order for costs be granted.

[22] In the circumstances, it is ordered:

[22.1] The application is dismissed.

[22.2] The applicants are ordered to pay the first respondent's costs on the scale as between attorney and client.

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON: 14 MAY 2024
JUDGMENT DELIVERED ON: 15 MAY 2024

COUNSEL FOR THE APPLICANTS: ADV. I MURERIWA
INSTRUCTED BY: THE APPLICANTS
REFERENCE: NONE FURNISHED

COUNSEL FOR THE FIRST RESPONDENT: ADV. D VAN NIEKERK
INSTRUCTED BY: ENDERSTEIN MALUMBETE INC
REFERENCE: N MALUMBETE-MALULEKE

NO APPEARANCE FOR THE SECOND RESPONDENT

