IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable
Case no. **79012024**

In the matter between:

S B GUARANTEE COMPANY (RF) (PTY) LTD Applicant
[Registration number: **20061021576107]**

And

MANYONI & GIJA INVESTMENTS CC First Respondent
[Registration number: **2009/207718123]**

SIBONGISENI SANELE NYAMBI Second Respondent
[Identity number: **8[…]**

Neutral citation: *SB Guarantee Company (RF)(PTY) Ltd v Manyoni & Gija Investments CC And Another*

Coram: **TL MANYE, AJ**

Heard: **08 MAY 2024**

Delivered: **12 SEPTEMBER 2024**

Summary: *Execution - The sale in execution - mortgage immovable property- Sale of residential property for recovery of outstanding bond repayments.*

ORDER

1. Judgment is granted in favour of the Applicant against the First and Second Respondent for payment of an amount of **R1 895 868.97.**

2. Payment of interest on the amount of **R1 895 686.97** at the rate of **11.750%** per annum from 24 January 2024 to date of final payment.

3. The following immovable property is declared specially executable: A Unit consisting of-

(a) Section no. 10 as shown and more fully described on Sectional Plan no. SS 170/2019, in the scheme known as Stone Creek in respect of the land and building or buildings situated at Bloemfontein (Extension 230), Mangaung Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 231 (two hundred and thirty one) 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 182[…],

(c) An exclusive use area described as swimming pool S1, measuring 14 (fourteen) square metres being as such part of the common property, comprising the land and the scheme known as Stone Creek in respect of the land and building or buildings situated at Bloemfontein (Extension 230), Mangaung Metropolitan Municipality as shown and more fully described on Sectional plan no. SS 170/2019] held by Notarial Deed of Cession of Right to Exclusive use SK 776/2019.

4. That the Registrar of the Honourable Court is authorized to issue a Writ of Execution against immovable property.

5. That the Applicant be authorized to execute against the immovable property with such reserve price as set by the Honourable Court.

6. That Respondents are ordered to pay the costs of this application on an attorney and client scale.

JUDGMENT

[1] The Applicant instituted this application proceeding against the First and Second Respondent for the payment of an amount of an amount of **R1 895 868.97** and payment of interest on an amount of **R1 895 886.97** at the rate of **11.750%** per annum from 24 January 2024 to date of final payment.

[2] Previous to the above application the Applicant had initial Application instituted against the Respondents on the 13th February 2024 seeking one payment of an amount of **R1 895 886.97;** payment of interest on the amount of **R1 895 868.97,** at the rate of **11.750%** per annum from 18th January 2023.

[3] The parties settled the application in paragraph 2 above by way of a settlement agreement, which was made an Order of Court on the 25th January 2023 by the Honourable Acting Judge Boonzaaier.

[4] The current application before Court as referenced in paragraph 2 above was launched on the 25th April 2024. The Applicant seek payment in an amount of **R1 895 868.97** together with an order that a certain immovable property be declared _specially_ executable.

[5] The Applicant alleges that the Respondents failed and/or neglected to comply with the settlement agreement entered into between the parties and also the Court Order of the 26th January 2023 which made the settlement agreement an order of Court.

[6] In terms of the settlement agreement the First and Second Respondents had

undertaken to settle the full outstanding balance on each account stipulated in paragraphs 4.1 to 4.10.3 of the settlement agreement on or before the 31st January 2023.

[7] Paragraph 4 of the settlement agreement and its sub-paragraphs provides *inter alia* that:

> *"The debtors hereby acknowledge that they are in default in terms of the agreements on the accounts mentioned in paragraph 4.1 to 4.10.3 are subject to and further acknowledge that they are truly and lawfully jointly and severally indebted and in favour of the bank as the principal debtor and sureties/guarantors as follows:*
>
> *4.1 In respect of account number **5[…]8:***
>
> *4.1.1 the amount of **R194 929.58;***
> *4.1.2 interest on an amount of **R194 929.58** at the rate of **18.90%** per annum compounded daily and capitalized monthly from 25th November 2022 to date of final payment, both days inclusive;*
>
> *4.2 In respect of account number **3[…]8:***
>
> *4.2.1 the amount of **R305 475.51;***
> *4.2.2 interest on the amount of **R305 475.51** at the rate of prime plus **8.00%** per annum compounded daily and capitalized monthly from 25th October 2022 to date of final payment, both days inclusive;*
>
> *4.3 in respect of account number **0[…]:***
>
> *4.3.1 the amount of **R235 895.83:***
> *4.3.2 interest on the amount of **R235 895.83** at prime plus*

***10.50%** per annum compounded daily and capitalized monthly from 25th October 2022 to date of final payment, both days inclusive;*

*4.4 in respect of account number **4[…]:***

*4.4.1 the amount of **R90 420.57;***

*4.4.2 interest on the amount of **R90 420.57** at the rate of **21.00%** per annum compounded daily and capitalized monthly from 25th November 2022 to date of final payment, both days inclusive;*

*4.5 in respect of account number **1[…]2:***

*4.5.1 the amount of **R2 479 142.21;***

*4.5.2 interest on the amount of **R2 479 142.21** at the rate of prime plus **3.00%** per annum compounded daily and capitalized monthly from 25th November 2022 to date of final payment, both days inclusive;*

*4.6 in respect of account number **1[…]5:***

*4.6.1 the amount of **R1068069.64;***

*4.6.2 interest on the amount of **R1 068 069.64** at the rate of prime plus **1.27%** per annum compounded daily and capitalized monthly from 2ffh November 2022 to date of final payment, both days inclusive;*

*4.7 in respect of account number **1[…]4:***

*4.7.1 the amount of **R288 104.07;***

*4.7.2 interest on the amount of **R288 104.07** at the rate of prime minus **0.25%** linked per annum compounded daily and capitalized monthly from 25th November 2022 to date of final* *payment, both days inclusive;*

*4.8 in respect of account number **1[…]3:***

*4.8.1 the amount of **R351 420.97;***

*4.8.2 interest on the amount of **R351 420.97** at the rate of prime minus **0.25%** per annum compounded daily and capitalized monthly from 25th November 2022 to date of final payment, both days inclusive;*

4.9 in respect of account number **3[…]9;**

4.9.1 the amount of **R660** ***982.07;***

4.9.2 interest on the amount of **R660** ***982.07** at the rate of prime plus **10.00%** per annum compounded daily and capitalized monthly from 25th October 2022 to date of final payment, both days inclusive;*

*4.10 in respect of account number **5[…]2;***

*4.10.1 the amount of **R2 035 993.30;***

*4.10.2 interest on the amount of **R2 035 993.30** at the rate of prime plus **0.00%** i.e. **10.50%** per annum from 25th November 2022 to date of final payment together with monthly insurance premium of **R0.00** and monthly service fee of **R240.00."***

[8] Paragraph 5 outline the undertaking to pay and applicable terms and conditions as set out as follows:

The debtors undertake to settle the full outstanding balance on each account stipulated in paragraph 4.1 on or before the 31st January 2023.

[9] In paragraph 6 of the settlement agreement the following is stated:

'Failure by the debtors to comply with paragraph 5 *above:*

5.1 *the debtors fail to adhere to paragraph 5 above and failed to rectify the breach/default after seven (7) days written notice, the debtors' consents to the following;*

5.2 The full outstanding balance together with interest thereon as per paragraph 4.1 to 4.3 above as well as the taxed legal costs will immediately become due and payable;

5.3 *The bank will be entitled to sell the property registered in the name of Manyoni* & *Gija Investments* CC *in terms of* a *power of attorney annexed hereto as annexure "SB 11" described as follows:*

A Unit consisting of-

(a) Section no. 10 as shown more fully described on Sectional Plan no. SS 170/2019, in the scheme known as Stone Creek in respect of the land and building or buildings situate at Bloemfontein (Extension 230) Mangaung Metropolitan Municipality, of which Section the floor area according to the said sectional plan, is 231 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.'

[10] It is not in dispute that the First Respondent was obliged to make payment of monthly instalments in terms of a mortgage bond account with number **5[…]2.** It is further not in dispute that the First Respondent defaulted on the obligation to make monthly payments.

[11] On the 13th December 2022 and 18th January 2023, the Applicant and the Respondent entered into a written agreement in respect of the Respondent's indebtedness to the Applicant. Almost a year later the settlement agreement was then made an Order of Court on the 26th January 2024.

[12] The Applicant's case before the court is that the Respondents have failed or neglected to rectify the breach of failure to settle account number **5[…]2** in accordance with the settlement agreement. In terms of the notice of demand the Respondents were referred to paragraph 6 of the settlement agreement that payment of the outstanding amount be made within seven (7) days failure of which the Applicants will proceed with the necessary legal action.

[13] The Applicant further argues that the outstanding balance due and payable to the Applicant is in an amount of **R1 895 868.97** together with interest on the said sum at the rate of **11.750%** per annum from 24 January 2024 to date of payment. It is for that reason that the Applicant is now seeking payment in the said amount and to execute against the Respondents' immovable property in terms of Rule 46 as it is primary place of residence of the Second Respondent.

[14] In opposition the Respondents filed the required answering affidavit in which the following defences are stated in paragraphs 12 to 18:

14.1 *'I wish to just bring to the Court's attention that subsequent to the conclusion of the settlement agreement, I have made several payments, settled, and closed off* a *large portion of the Standard Bank credit facilities. Those that I have not able to settle and close off were further deduced into* a *further settlement agreement with Standard Bank which are now in the process of being paid off.*

14.2 *In respect of this account, it is indeed true that I have made at least* a *payment amounting to R200 000.00 odd. This is because that is the amount I could afford.*

14.3 *I* am *very well aware of my obligations to the Applicant. I* am *equally cognisant of the obligation that ensued on my part by virtue of the settlement agreement entered into with the Applicant.*

14.4 *I must forthwith state that I am experiencing difficulties financially. I* am a *businessman in the engineering sector. I provide services to various clients and mostly to Municipalities. I have been at least for the past three (3) years experiencing* a *difficulty in receiving payments from* a *majority of my clients and more specifically from the Municipalities. This has gone on to the extent that I have had to issue process against them in this very Court.*

14.5 *I further struggled to get information from Standard Bank in terms of statements. I strive to try plan to make payment on the various accounts and when requesting statements from the Applicant to try plan around the amounts owing the Applicant only provides same only after one (1) month which in tum causes further delays on my end.*

14.6 *Though I have in some obtained judgment, I* am *still struggling with most. For those that I have obtained judgment against, I am in the process of executing.*

14.7 *Again, I understand that this is not* a *defence not only to my debt but also in terms of the settlement agreement. I merely bring these to the attention of the Court to elucidate that I* am *not merely sitting and doing nothing. I* am *trying my level best given the circumstances.*'[1]

[15] Notwithstanding the settlement agreement in which the Respondents undertook to make payment of full outstanding balance the Respondent has failed to do so. In fact, the Applicant submits that the Respondents have not made any payment in respect of the debt for more than a year and accordingly the Applicant is

[1] Indexed and paginated papers, p. 108, para 12 to para 18

left with no option but to approach the Court on the grounds of the breach of settlement agreement made an order of this Court.

[16] As a security for the Respondent's indebtedness, the First Respondent registered a sectional or continuing covering mortgage bond with no. **SB 719[…]** in favour of the Applicant over the immovable property for the sum of **R2 000 024.00** and the additional sum of **R506 000.00.** [2] It is my considered view that the Respondents were well aware that in terms of the mortgage bond, the Applicant would be entitled to institute proceedings for the recovery of all amounts due to the Applicant and for a Court order declaring the property executable in the event of failure to perform obligations or pay any sum which may be legally claimed by the Applicant. Further, in terms of the settlement agreement the Respondents agreed that the Applicant will be entitled to sell the immovable property. Notwithstanding all this knowledge the Respondents still breached the settlement agreement and the obligations therein.

[17] It is important to highlight that the settlement agreement made an order of Court is still in existence. The Constitution of the Republic[3] calls upon all parties to obey the Court orders. Section 165(5) directs that an order for a decision issued by a Court is binding to all persons who it applies. In *casu* and in my view, barring an appeal against the Court order, the Court order incorporating settlement agreement of the 26 January 2023 remains binding on the Respondents. It is common cause that there is no appeal pending or any other application pending before any Court in relation to this matter. This Court was and is not seized with an appeal or review of the main matter that resulted in the settlement agreement and the Court order. Any attempt in assessing or pronouncing on this Court Order will be irrational as the Respondents have accepted liability to the Applicant.

[18] In terms of **Rule 46A(2)(a)** a Court considering an application under this rule must:

---

[2] Indexed and paginated p. 94, Sectional Continuing Covering Mortgage bond
[3] Act 108 Of 1996

"(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor." **Rule 46A(2)(b)** especially provides that "a *Court shall not authorize execution against immovable property which is the primary residence of* a *judgment debtor unless the Court, having considered all property is warranted."*

[19] Rule 46A seeks to protect homeowners ensuring that their homes are not sold in execution for prices which are not market-related. The Courts are called upon to take account of the market value of the property, making a fair determination of what the fair reserve price would be. It is therefore a requirement for an Applicant to have a sworn independent valuation certificate by a property evaluator which in this instance the Applicant has complied with.[4]

[20] In this instance the Court is able to establish the true market-value of the property as a starting point before an attachment can be ordered to the property.

[21] The Constitutional Court in **Jaftha v Schoeman**[5] Mokgoro J found that in a matter where execution is sought against property which is the primary residence of a judgment debtor a Court must consider whether the Rules of the Court have been complied with; whether there are alternative ways of recovering the judgment debt; further take into account, among other things, the circumstances in which the judgment debt was incurred; attempts made to pay off the debt; the financial position of the parties; the amount of judgment debt; whether the judgment debtor is employed or has a source of income to pay off the debt; and other factors relevant to this case.

[22] The Respondents deponent's answer *in casu* is not satisfactorily in that it has failed to attach any proof of how much he is currently owed by his Municipality clients. In fact, the Second Respondent has not made a case that he is indeed indigent as he has already stated that he is a businessman doing business with various clients including Municipalities. He further failed to indicate how many

---

[4] See: index and paginated papers, p. 86, annexure "FA 7" - Light Stone Scheme Valuation

[5] 2005 (2) SA 140 CC

individuals' elderly or minor reside at affected property subject of this case.

[23] Courts are enjoined to ensure that the rights of all litigants in such matters are balanced fairly, especially parties with a direct interest. It is of importance that the Court before it makes a determination in such applications that it has proper knowledge of how much the bond was initially and the current outstanding balance therefore from the bond originator which in this instance is Standard Bank. As I indicated previously this has already been ascertained and considered to by the Respondents including market valuation of the immovable property from Light Stone Scheme Evaluation.

[24] The Applicant currently has a real right enforceable against the Respondents over this property if indeed there is a home loan which is not in dispute as in this case.

[25] The underlying principle emphasized here is that the execution against immovable property which is the primary residence of the judgment debtor requires judicial oversight. The aim of which is to give effect to Section 26 of the Constitution which is to protect the right to adequate housing and security of tenure. The need for judicial oversight in such applications and the reasons therefore have been the subject of a number of Court applications in the Supreme Court of Appeal, Constitutional Court and individual divisions of the High Courts.

[26] The Constitutional Court in the matter **Eke v Parsons** stated as follows:

> *"The effect of a settlement order is to change the status of rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the /is between the parties; the /is becomes res judicata (literally, 'a matter judged). It changes the terms of a settlement agreement to an enforceable Court order. The type of enforcement may be execution or contempt proceedings or it may take any form permitted by the nature of the order."*[6]

[6] 2016 (3) SA 37 CC at para [31]

[27] In **Standard Bank of South Africa Ltd v Pygon Trading Close Corporation**[7] the following was stated:

"The consent order, which embodied the settlement agreement, had to be enforced if it was not set aside. No application was launched to rescind or appeal the consent order. Nor was it abandoned. It was of full force and effect. As such, the High Court was not entitled to ignore it and to enter the terrain of the previous /is between the parties. The Court had no jurisdiction to do anything other than give effect to the consent order. The only additional information required was whether or not the amount of R18 million had been paid timeously or not. That undisputed information was before it. In the circumstances, it was obliged to make the final order sought by the bank."

[28] In the premises of the aforesaid it is not in dispute that the parties concluded a settlement agreement and that the agreement was made an order of Court. Further it is not in dispute that the Respondents did not comply with their obligations in terms of the settlement agreement and therefore breached the Court order. In my view this Court is therefore bound by the decisions of the Constitutional Court and the Supreme Court of Appeal to the extent that a Court Order which embodies a settlement agreement has to be enforced if it is breached.

[29] In the circumstances the following order is made:

1. Judgment is granted in favour of the Applicant against the First and Second Respondent for payment of an amount of **R1 895 868.97.**

2. Payment of interest on the amount of **R1 895 686.97** at the rate of **11.750%**
per annum from 24 January 2024 to date of final payment.

3. The following immovable property is declared specially executable:

---

[7] 2024 JDR 1232 SCA at para [23]

A Unit consisting of -

(d) Section no. 10 as shown and more fully described on Sectional Plan no. SS 170/2019, in the scheme known as Stone Creek in respect of the land and building or buildings situated at Bloemfontein (Extension 230), Mangaung Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 231 (two hundred and thirty one) square metres in extent; and

(e) 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 182[…],

(f) An exclusive use area described as swimming pool S1, measuring 14 (fourteen) square metres being as such part of the common property, comprising the land and the scheme known as Stone Creek in respect of the land and building or buildings situated at Bloemfontein (Extension 230), Mangaung Metropolitan Municipality as shown and more fully described on Sectional plan no. SS 170/2019 held by Notarial Deed of Cession of Right to Exclusive use SK 776/2019.

4. That the Registrar of the Honourable Court is authorized to issue a Writ of Execution against immovable property.

5. That the Applicant be authorized to execute against the immovable property with such reserve price as set by the Honourable Court.

6. That Respondents are ordered to pay the costs of this application on an attorney and client scale.

T L MANYE, AJ

APPEARANCES

For applicant:	**Advocate J Els**
Instructed by:	Phatshoane Henney Attorneys, 35 Markgraaff street, Westdene, Bloemfontein.
For respondents:	**Advocate Z Nyezi**
Instructed by:	Blair attorneys 32 1st Avenue, Westdene, Bloemfontein.