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

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **1271/2022**

In the matter between:

ABSA BANK LTD Applicant/Plaintiff

And

BETHANE JOHANNES SETOUTO 1st Respondent/Defendant
ID: 84[..]
(Unmarried)

DINEO NAUMI SETOUTO 2nd Respondent/Defendant
ID: 80[…]
(Unmarried)

Coram: DAFFUE J
Heard: 29 AUGUST 2024
Delivered: 4 OCTOBER 2024

This judgment was handed down electronically by circulation to the applicant's representatives and the respondents by email and release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 4 OCTOBER 2024.

Summary: Application to declare immovable property executable in terms of Rule 46A. Default judgment for payment of the capital amount of the loan and interest has been granted on 8 December 2022. Numerous offers were made to settle the arrears before and after judgment, but notwithstanding some payments, the arrears increased all the time. A warrant of execution in respect of movables was issued in January 2023, but could not be served by the sheriff as the property's gate were kept

locked. The bank proceeded with an application to declare the immovable property executable. The application was set down for hearing on 2 May 2024 and thereupon postponed twice until it was eventually heard on 29 August 2024. Due to no monthly payments, alternatively totally insufficient monthly payments, the arrears increased exponentially from the date when the demands in terms of s 129 of the NCA were sent out. After considering all the circumstances, the court granted the order as requested, setting a reserve price of R630 000, being the forced sale value of the property, but suspended the operation of the order until 31 December 2024.

ORDER

1. The immovable property described below is declared specially executable and, to this end a writ of execution may be issued as envisaged in terms of rule 46A(2) of the Uniform Rules of Court:

ERF 3[…] MANGAUNG
DISTRICT BLOEMFONTEIN, PROVINCE FREE STATE
IN EXTENT: 347 (THREE HUNDRED AND FORTY SEVEN) SQUARE METRES
HELD BY DEED OF TRANSFER NUMBER: T29[…]

subject to the conditions therein contained.

2. The registrar is authorised to issue a writ of execution against the immovable property.

3. A reserve price of R 630 000.00 is set in terms of rule 46A(9)(a) & (b) of the Uniform Rules of Court, being the forced value of the property, subject to applicant's rights as contained in rule 46A(9)(c) – (e).

4. Costs of suit on an attorney and client scale.

5. The operation of the order in paragraphs 1 to 3 above is suspended until 31 December 2024.

JUDGMENT

Daffue J

Introduction

[1] This application in terms of Rule 46A of the Uniform Rules of Court is just one of so many applications set down for hearing in this court on a weekly basis. One remarkable difference between this application and the others is that the two debtors, a brother and a sister, not only filed papers in opposition of the application, but appeared in person to address the court.

The parties

[2] The applicant is Absa Bank Ltd, a financial institution and registered credit provider.

[3] The first respondent is Bethane Johannes Setouto, a 39-year-old male. The second respondent is his sister, Dineo Naumi Setouto, a 44-year-old female.

The relief sought and the opposition thereto

[4] The applicant seeks an order declaring the following immovable property specially executable and authorisation for it to be sold at a reserve price R 630 000, together with costs of the application on an attorney and client scale:

> 'Erf 3[…] Mangaung,
> District Bloemfontein, Province Free State
> In extent: 347 (three hundred and forty-seven) square metres,
> held by deed of transfer number: T29[…].'
> (the property)

[5] I shall deal herein later with some of the facts presented by the respondents, but merely wish to mention at this stage that they do not deny their liability towards the applicant and the extent of their debt. They submit that the property should not be sold in execution insofar as they are prepared to make payments to the bank in the amount of R 3 000 per month.

Common cause facts

[6] The following facts are common cause, or not expressly denied by the respondents:

a. the respondents started to default on their payments in March 2020;

b. on 31 January 2022 letters of demand in terms s 129 of the National Credit Act (NCA) were sent to the respondents who were in arrears at the time in the amount of R 48 730.56 due to sporadic and/or non-payment of the instalments from March 2020;

c. summons was issued on 18 March 2022 for payment of an amount of R 685 773.23 together with interest from 26 January 2022;

d. nine months later and on 8 December 2022 default judgment was granted in respect of the aforesaid capital and interest;

e. on 11 January 2023 and immediately after default judgment was granted, a warrant of execution in respect of movable property was issued, but the sheriff could not serve the warrant as the respondents' property was kept locked;

f. the arrears increased exponentially and on 6 February 2024 amounted to R 218 807.63;

g. on 25 June 2024 and just before the filing of the replying affidavit in this application, the outstanding amount was R 905 821.71 and the amount in arrears R 258 800.33;

h. the present monthly instalment is R 10 502.31 whilst the last payment received from the respondents, *ex facie* the papers, was in the amount of R 2 500 on 14 June 2024;

i. various indulgences were sought and granted to the respondents over the period from February 2021 which I have considered, but I do not intend to set these forth in detail herein.

j. it is obvious that the default status of the respondents worsened significantly over the last few years, ie from March 2020 till now, being a period of four and a half years;

k. on 14 October 2022 the applicant accepted an offer for repayment of the outstanding amount in instalments of R 10 000 per month and an agreement was entered into on 19 December 2022, but soon thereafter respondents defaulted on this agreement;

l. on 19 March 2024 and after correspondence between the parties, the respondents offered to pay R 6 000 per month whilst the current instalment at that time was R 10 502.31;

m. this last offer was unacceptable to the applicant whereafter the matter was set down for judgment to declare the property executable.

Evaluation of the evidence and submissions made

[7] Adv I Macakati submitted that this matter had a long history and that finality should now be obtained. She indicated, as a final attempt to assist the respondents, that the court may consider granting the order as requested, but to suspend the operation thereof for a month or two to enable the respondents to consider their options.

[8] Although the applicant objected to the ‘affidavits’ filed on behalf of the respondents in this application, alleging that they were not properly deposed to, I was prepared to consider the information tendered therein as they were not legally represented. Although evidence was also tendered from the bar, I was prepared to listen to them. They explained that the property is their family dwelling, occupied by the two of them as well as relatives such as their 76-year-old aunt, their 57-year-old unemployed uncle and a minor niece and nephew.

[9] The second respondent was previously employed with the applicant, but retrenched on 2 March 2020. Since then, she tried to conduct the business of selling clothes, perfumes and hair products, but could not earn enough money to comply with the obligations towards applicant. At that stage the Covid-19 epidemic caused a lockdown as we all know. The first respondent was the only family member employed at the time and he only earned an amount of R 10 000 per month.

[10] The second respondent confirmed that she, either on her own or with the assistance of legal representatives, had several interactions with members of the applicant over the years. In the latest offer during May 2024, they were prepared to pay R 3 500 to the applicant for a period of 24 months 'towards the payment of the debt we owe and pending all my efforts to secure a job or my business efforts begin paying off sufficiently to help the 1st respondent'[1]. Applicant declined this offer.

[11] The respondents submitted that the applicant's attitude was totally unreasonable. It should have accepted their latest offer. This submission was vehemently denied by Ms Macakati who emphasised that it is now time for the property to be sold in execution in order to prevent further damage to the applicant.

[12] According to the sworn valuation of the property, it is worth R 900 000. The municipal valuation is R 610 000 and that the forced sale value is calculated at R 630 000. These figures are not denied. It is also clear that it was not possible for the sheriff to attach any movable property in order to provide for payment of some of the arrears. It is also apparent that the applicant is now an unsecured creditor in respect of the amount in excess of the total amount for which the two mortgage bonds were registered. The outstanding amount of R 905 821.71 is higher than the sworn valuation of the property and much higher than the forced sale value thereof. Having regard to the interests of the respondents and their relatives on the one hand, whose primary residence may be sold if an order as sought by the applicant is granted, and the rights of the applicant as a commercial financial institution on the other hand, I am satisfied that the respondents and their relatives cannot be allowed to continue residing in the property without complying with their contractual obligations. It is also apparent that neither the first, nor the second respondent, is married and neither of them have children of their own.

[1] Replying affidavit: p 155, para 31.

[13] The respondents are entitled to the right to adequate housing as provided for in s 26 of the Constitution. If it is impossible for them to pay an instalment in excess of R 10 000 in respect of a relatively middle of the market property, they should consider renting an available property that suit their budgets. It cannot be expected of the applicant to allow the situation to proceed any further.

[14] I have considered the applicant's request that the operation of the order be suspended for a month or two. Bearing in mind the festive season on hand, I decided to grant the order, but to suspend the operation thereof until 31 December 2024. The applicant is entitled to its costs as claimed.

Order

[15] The following order is made:

1. The immovable property described below is declared specially executable and, to this end a writ of execution may be issued as envisaged in terms of rule 46A(2) of the Uniform Rules of Court:

ERF 3[…] MANGAUNG
DISTRICT BLOEMFONTEIN, PROVINCE FREE STATE
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4. Costs of suit on an attorney and client scale.

5. The operation of the order in paragraphs 1 to 3 above is suspended until 31 December 2024.

DAFFUE J

Appearances

For applicant/plaintiff:	Adv I Macakati
Instructed by:	JG Botha Attorneys BLOEMFONTEIN.
For respondents/defendants:	In Person