

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NUMBER.: 51/2020

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

And

RICKY RODWILL VAN NIEKERK

First Respondent

MELANY CHRYSTAL VAN NIEKERK

Second Respondent

THE STANDARD BANK OF SOUTH AFRICA LIMITED Third Respondent

JUDGMENT

Beshe J

[1] This is an application in terms of *Rule 46A* of the *Uniform Rules* of this court to have first and second respondents' immovable property declared executable and for the court to authorise the Registrar to issue a warrant of execution in respect of the property. The property is described as Erf 1[...] Bethelsdorp, in the Nelson Mandela Bay Metropolitan Municipality, Province of the Eastern Cape.

[2] The application is opposed by the first and second respondents who are married in community of property and co-owners of the immovable property concerned.

[3] The third respondent is cited as an interested party being the holder of the mortgage bond that is registered over the immovable property. Applicant does not seek any cost order against the third respondent.

[4] It is common cause that on 8 July 2020 default judgment was granted in favour of the applicant against *inter alia* first respondent and three others for payment in the sum of R805 777.14, interest thereon and costs.

[5] According to the certificate of balance, as of 5 February 2024, the amount owing to the applicant is R410 512.18 plus interest. The debt was incurred on behalf of a company that has since been liquidated. Certain payments have since been made by members of the said company in liquidation.

[6] Applicant contends that since a *nulla bona* certificate has been rendered in respect of first and second respondents, they have not taken adequate steps to pay the judgment debt hence the application to have their property declared executable. Applicant points out the following factors in support of the application:

The market value of the property sought to be executed is R1 050 000.00. However, the property is valued at R720 000.00 by the municipality. The immovable property is believed to be a residential property. The amount due to the Nelson Mandela Metropolitan Municipality in respect of charges as of 3 February 2023 is R6 221.59.

(The last amount is not common cause.)

[7] The answering affidavit was deposed to by the first respondent. Therein, he outlines the manner in which the debt was incurred. Namely, that he was constrained to secure an overdraft facility on behalf of a company in respect of which he was one of the directors. He also explains how he together with co-defendants in the main case ended up being directors and suggest that they were duped into becoming directors being black men. This was for purposes of buying material for a project that

was awarded to the company. This in turn so that he could continue to draw a salary to take care of his family which included young children.

[8] Mr van Niekerk then goes on to state reasons why the application is opposed. Those reasons being *inter alia* that:

The property is his primary residence. He stays in the property with second respondent and their three children aged fourteen, eight and three respectively. It is mortgaged with third respondent with an amount still outstanding on the mortgage bond. Should the property be sold, they will have no alternative place to stay, and the property will be sold to their detriment. The debt was incurred for use by a company and not for his own use/benefit/enjoyment. Those responsible for making payment on behalf of the company failed to do so even though payments were made for work done by the company. Since February 2023 he has been permanently employed and thus has means to satisfy the debt other than by having their primary residence sold in execution.

[9] In reply, applicant states that even though first respondent wrote to advise that he had secured permanent employment, he has not made any payments towards the outstanding balance.

[10] The respondents appeared in person in view of the withdrawal of their attorneys of record as per their notice dated 21 November 2023.

[11] As a result of respondents' attorneys of record withdrawal, respondents, instead of filing heads of argument, filed what they categorised as their response to applicant's heads of argument. This response is in the form of an affidavit deposed to by both first and second respondents. Attached thereto are a number of annexures. The annexures seem to mostly concern factors relating to how the debt was incurred. Also attached is proof of payment of various amounts towards the debt made during the years 2023 and 2024. This has raised the ire of the applicant which led to the raising of a complaint that the respondents have filed an additional affidavit without having sought the court's permission to do so.

[12] However, applicant acknowledges in its heads of argument that first respondent has made certain payments after this application was launched, but that such payments have not been effective in reducing the judgment debt. Further that the first respondent has not taken the court into his confidence by placing information before court of how much he earns and how he proposes to settle the debt.

[13] It is of no moment therefore that respondents' heads of argument are in the form of an affidavit. They are also aptly entitled "response to the applicant's heads of argument". The annexures thereto, as indicated are relevant to the manner in which the debt was incurred which appears to be common cause between the parties. The only annexures that are of relevance to the present application are those relating to the payments that have subsequently been made by first respondent. Those too are not in dispute. The payments have become common cause.

[14] Respondents deny that their debts will be extinguished if the property is sold. They will still owe the third respondent. They further point out that they will not be able to secure an alternative place to stay because they do not have a great credit score because they fell on hard times after the company was liquidated and first respondent only secured a permanent job recently. They deny that there is sufficient equity in their immovable property arguing that they will still remain indebted to the applicant as well as in respect of their mortgage bond and unable to secure an alternative place to stay. Further that the prejudice they will suffer if the execution application was granted and they lost their home, will be much higher than the prejudice the applicant will suffer.

[15] It is trite that the objective of *Rule 46A* is meant to protect debtors, in particular indigent debtors who were in danger of losing their homes. This is so as to give effect to *Section 26(1)* of the Constitution. *Section 26(1)* guarantees everyone the right to have access to adequate housing. The aim of *Rule 46A* is to enable the court to consider whether the *Section 26(1)* rights of the debtor would be violated if their house were to be sold in execution. This is the case in instances where the property concerned is the debtor's primary residence.

[16] There are a number of factors that the court will have regard to when considering whether the debtors' property should be declared executable. Those being, *inter alia*, whether the property is the debtors' primary residence. In the case under consideration, it appears to be common cause that the property is first and second respondents' primary residence together with their minor children. The circumstances under which the debt was incurred. Those were outlined by the first respondent. I need not repeat them. The amounts owing both in respect of the mortgage bond and the debt under consideration in this matter. The debtors' payment history. The reason for default/non-payment. The proportionality of the prejudice the creditor will suffer if the execution were to be refused compared to the prejudice the debtor will suffer if the execution of his home went ahead.

[17] I am of the view that the respondents have shown that they will suffer more prejudice than the creditor should their property be executed. They have also shown albeit without much detail, probably due to being lay persons, that they are prepared to service the debt and that first respondent will be able to do so now that he is permanently employed. I do not agree with the applicant that the payments are sporadic. As to whether the debtor will lose access to housing as a result of execution being levied against the property, the respondents have shown that they will lose access to housing should their house be declared executable and sold.

[18] Having considered all the circumstances of this matter, especially those that have a bearing on the factors to be considered in respect of applications of this nature, I am of the view that the respondents are taking steps to reduce the debt and that declaring the property executable in the circumstances will infringe their right under *Section 26(1)* of the Constitution.

[19] Accordingly, the application is dismissed. There will be no order as to costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Heard : 15 February 2024

Date Reserved : 15 February 2024

Date Delivered : 9 July 2024

Judgment handed down electronically by circulation to the parties' legal representatives via email and release to SAFLII.

The date and time of handing down of the judgment is deemed to be on the 9 July 2024 at 13h00.