

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: A3114/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

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BC WANLESS

24 January 2025

In the matter between:

SIBONISO CALEB SITHOLE

Appellant

and

THE BODY CORPORATE OF BONDI

Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Caselines. The date and time for hand-down is deemed to be 10h00 on 24 January 2025

JUDGMENT

WANLESS J (Bhengu AJ concurring)

Introduction

[1] This is an appeal by Siboniso Caleb Sithole (*“the Appellant”*) against an order (*“the order”*) made on the 1st of September 2022 by M Nair (*“the Magistrate”*) in the Magistrates’ Court for the District of Johannesburg West, held at Roodepoort (*“the court a quo”*). The order was made pursuant to the court a quo having heard an opposed application (*“the application”*) on the same day. Thereafter, on the 16th of February 2023, the Magistrate provided written reasons (*“the reasons”*) for the order.

[2] In the application in the court *a quo* the Appellant was the Second Respondent; one Sibusiso Derrick Ndebele (“*Ndebele*”) was the First Respondent and The Body Corporate of Bondi (*the Respondent in this appeal*) was the Applicant. Only the Appellant opposed the application and there was no opposition thereto by Ndebele. In this Court, only the Appellant has appealed against the order of the court *a quo* and Ndebele is not a party to these appeal proceedings. The parties in this judgment shall be referred to as they are cited herein, namely the Appellant and the Respondent.

The order of the court a quo

[3] The order under case number 5293/2019, reads as follows:

“1 Applicant is granted leave to execute against the immovable property of which the First and Second Respondents are the registered owners namely, Section 7 (being door number 7), Bondi, Van Der Kloof Street, Roodepoort, in terms of the provisions of section 66(1)(a) of the Magistrates’ Court Act 32 of 1944 (read with Rule 43A(8)(d) of the Magistrates’ Court Rules.

2. The sale of execution referred to in paragraph 1 herein of the immovable property of which the First and Second Respondents are the registered owners, namely, Section 7 (being door number 7), Bondi, Van Der Kloof Street, Roodepoort is suspended for 3 (three) months until 1 December 2022 to allow the First and Second Respondent’s (sic) an opportunity to sell the said property or to obtain a bank approved buyer alternatively for the First and Second Respondents to jointly or severally pay the judgment debt, together with the interests (sic) and costs as granted in favour of the Applicant, the one paying the other to be absolved.

3. That the First and Second Respondents pay the costs of this application on a party and party scale including the costs of the execution and sale of the immovable property situated at Section 7 (being door number 7), Bondi, Van Der Kloof Street, Roodepoort.

4. This order is corrected in terms of section 36(1)(c) of the Magistrates’ Court Rules postea at 13h25 in that it was omitted to mention that a reserve price is set at

R1 150 000.00 (one million one hundred and fifty thousand rands) in terms of Rule 43A(8)(e) of the Magistrates' Court Rules."

The grounds of appeal.

[4] As a result of the Appellant being unrepresented during the appeal process, both in the court *a quo* and in this Court, there is no document clearly setting out the grounds relied upon by the Appellant in this appeal. In passing, it should be noted that the Respondent, in light of the fact that the Appellant was unrepresented as aforesaid, did not (*correctly in the opinion of this Court*) oppose the matter on the basis that the Appellant had failed to comply with any of the formal requirements involved in the prosecution of a civil appeal from the Magistrates' Court to the High Court. Arising therefrom, this Court, in the interests of justice and in accordance with the principle of finality, condoned any such failures and the matter proceeded before this Court on appeal.

[5] When ascertaining the Appellant's grounds of appeal, this Court relied upon, *inter alia*, an affidavit deposed to by the Appellant in the Appellant's "*application for leave to appeal*" in the court *a quo*; the reasons of the court *a quo* ("*the reasons*"); the Heads of Argument filed on behalf of both parties in this Court and the *viva voce* argument placed before this Court during the hearing of the appeal.

[6] From the foregoing, it can be determined that the Appellant relies on two principal grounds of appeal, namely:

6.1 that the Magistrate erred when finding that, having regard to the facts of the matter, it was appropriate to grant an order, *inter alia*, declaring the immovable property specially executable in terms of the provisions of subsection 66(1) of the Magistrates' Court Act 32 of 1944 ("*the Act*") read with the provisions of rule 43A of the Magistrates' Court Rules ("*the rules*"); and

6.2 the Magistrate erred by failing to properly consider section 26 of the Constitution and that the granting of the order by the court *a quo* would render the Appellant homeless.

The reasons provided by the court a quo for the order granted.

[7] In the reasons the Magistrate found a number of facts to be proven by the Respondent. This Court agrees with the factual findings of the court a quo and also finds that those facts were largely (*if not solely*) common cause and/or could not be seriously disputed by either of the parties in the application.

[8] Those facts, are, *inter alia*, the following, namely:

8.1 Ndebele and the Appellant are the registered co-owners of Section 7 (being door number 7), Bondi, Van Der Kloof Street, Roodepoort (*“the immovable property”*);

8.2 the immovable property was purchased for R 609 000.00;

8.3 the Respondent instituted an action against Ndebele and the Appellant for arrear levies incurred during the period 22 October 2018 to 21 May 2019 in the sum of R50 974,31. Ndebele and the Appellant failed to defend the said action, and on the 10th of October 2019, the Respondent was granted default judgment in the sum of R43 783,19, together with interest and costs;

8.4 pursuant to the Respondent obtaining judgment by default the Respondent obtained a writ of execution against the movable property of Ndebele and the Appellant;

8.5 thereafter, on the 29th of September 2019 the Sheriff effected personal service of the warrant of execution in respect of Ndebele’s movable property, The return of service was one of *Nulla Bona*;

8.6 on the 27th of August 2021 the Sheriff once again effected personal service of a warrant of execution in respect of Ndebele’s movable property. As was the case on the 29th of September 2019 , the return was one of *Nulla Bona*;

8.7 also on the 27th of August 2021 the Sheriff effected personal service of a warrant execution in respect of the Appellant’s movable property. As was the case in respect

of the two returns of service for Ndebele, the return in respect of the Appellant was also one of *Nulla Bona*;

8.8 on the occasions when the Sheriff was able to question both Ndebele and the Appellant, as reflected in the various returns of service, both debtors advised the Sheriff that they owned no movable assets which could be attached and sold in execution in order to reduce their indebtedness to the Respondent;

8.9 the Appellant resides at the immovable property and the immovable property is the Appellant's primary residence. Ndebele does not reside at the immovable property. In the premises, the immovable property is not his primary residence;

8.10 neither Ndebele nor the Appellant have paid to the Respondent any amounts in respect of the judgment debt. Further, no amounts have been received by the Respondent from either of them in respect of levies for the immovable property. The amount in respect thereof continues to accrue;

8.11 it has never been denied by the Appellant that, as at the 10th of October 2019 (*the date of default judgment*), he and Ndebele are liable to the Respondent in respect of the judgment debt, together with interest and costs. Further, it is not in dispute that the indebtedness of Ndebele and the Appellant to the Respondent continues to increase as a direct result of non-payment of levies due to the Respondent. The only "*defence*" proffered in the Appellant's Answering Affidavit in this regard was that the Appellant wished to be given an opportunity to settle the outstanding debt;

8.12 further and in this regard, the Appellant, in his Answering Affidavit, offered to pay an amount of R 2 000.00 per month to settle the entire indebtedness. This offer was made despite the fact that neither the Appellant nor Ndebele have made any payments whatsoever, as set out above. It was also never seriously disputed and no documentary evidence was ever placed before the court *a quo* by the Appellant to show otherwise, that, as at 1 April 2022, the outstanding debt had increased to the sum of R222 154.24;

8.13 when the court *a quo* granted the order on the 1st of September 2022 the outstanding mortgage bond in respect of the immovable property was R 631 890.31; the estimated market value of the immovable property was R1 400 000.00 and the amount owing to the municipality was *(as at the 7th of October 2020)* the sum of R77 088.06.

The law

[9] Subsection 66(1) of the Act reads as follows:

“66. Manner of execution

- (1) (a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made. “ *(Emphasis added)*.

[10] Subrules 43A(2)(a)(i) and (ii), in dealing with the execution against residential immovable property, states:

“(2)(a) A court considering an application under this rule must—

- (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
- (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence. *(Emphasis added).*”

[11] Section 26 of the Constitution reads:

“Housing: - (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (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. *(Emphasis added)*.

[12] Subrule 43A(8) states:

“(8) A court considering an application under this rule may—

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b)

(i)

(ii)

(c)

(i)

(ii)

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f)

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

(Emphasis added)

“

Discussion

[13] Was it appropriate for the court a quo to grant an order, *inter alia*, declaring the immovable property specially executable in terms of the provisions of subsection 66(1) of the Act read with the provisions of rule 43A of the rules?

[14] It was submitted, on behalf of the Respondent, that despite subrule 43A(1) stating that the rule (*rule 43A*), in general and very broad terms, is applicable to *all* matters in which execution against residential immovable property is sought, the *real* enquiry which this Court should make, in determining whether the court *a quo* erred in granting the executability order that it did, which necessitates the applicability of the rule, starts with the provisions of subrule 43A(2)(a). The enquiry which the court must undertake is as set out in subparagraphs (i) and (ii) of that subrule (*See paragraph [10] ibid*).

[15] In this regard, it is common cause that the immovable property against which the Respondent intends to execute *is* the primary residence of the Appellant but is *not* the primary residence of Ndebele. It was further submitted by the Respondent that upon a proper interpretation of the aforesaid rule (*rule 43A*) a clear distinction is drawn between residential properties which *are* the primary residence of the judgment debtor and those which are *not*. This Court is in agreement therewith. Not only is this clear from a simple reading thereof but is clear also from the various authorities relied upon by the Respondent's Counsel during argument before this Court. (*ABSA Bank Limited v Kobe; ABSA Bank Ltd v Vokwani; and Standard Bank of South Africa Ltd v Colombick and Another* (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 485; 2018 (6) SA 492 (GJ) (12 September 2018)). In addition thereto, this was never disputed by the Appellant, either in the court *a quo* or during the hearing of this appeal. These authorities, whilst they mainly deal with the provisions of rule 46A in the High Court, are equally applicable to matters being decided in terms of rule 43A in the Magistrates' Court.

[16] Further, the Respondent (*correctly in the opinion of this Court*), citing in support thereof the matter of *Standard Bank of South Africa Ltd v Hendricks and various other matters* 2019 (2) SA 620 (WCC), submitted that the primary test is whether a person will lose his or her home, meaning losing his/her security of tenure. In the premises, it was submitted (*once again correctly in the opinion of this Court*) that rule 43A was promulgated in order to protect

individual homeowners, who may lose their primary residences/their security of tenure and *not* judgment debtors who have investment properties which are not occupied by them.

[17] Following thereon, it is clear that rule 43A does not find application insofar as Ndebele is concerned and the order declaring the immovable property specially executable was properly granted against him. This is simply because, as is abundantly clear from the application papers and as set out both in the reasons and in this judgment, the Respondent has obtained judgment against Ndebele and has not been able to execute on the judgments (*evidenced by the two Nulla Bona returns obtained against Ndebele, dealt with above*) and/or the fact that the judgment has not been satisfied (*also dealt with above*). It is also imperative to note that not only did the Respondent make out a proper case for the relief sought in the court *a quo* in respect of Ndebele but Ndebele elected not to oppose the granting of that relief. Moreover, he has elected not to appeal the decision of the court *a quo*.

[18] Insofar as the Appellant is concerned the provisions of rule 43A clearly apply in light of the fact that it is common cause that the immovable property is the Appellant's primary residence. The principal (*if not sole*) reason as to why the Appellant avers that the Magistrate erred in granting the order (*the first and very broad/general ground of appeal as ascertained by this Court above*) was that the Appellant allegedly signed the *Nulla Bona* return on the 27th of August 2021 on behalf of Ndebele. Arising therefrom, it was submitted by the Appellant that it could not be held that all alternative means had been considered by the Respondent of "*satisfying the judgment debt other than execution against the judgment debtor's primary residence*" as set out in subrule 43A(2)(a)(ii) (*See paragraph [10] ibid*).

[19] This submission was rejected by the Magistrate for various reasons. Firstly, the Magistrate noted (*correctly*) that the Appellant had failed to make any averments whatsoever in respect of this submission in his Answering Affidavit in the application before the court *a quo*. In the premises, the Respondent was not provided with the opportunity to deal with same in its Replying Affidavit. At no stage whatsoever did this allegation, later made by the Appellant in argument and unsupported by any evidence by way of affidavit, constitute an issue to be decided by the court *a quo*. It therefore cannot be said that the Magistrate erred when deciding that the Respondent had considered means of satisfying the indebtedness of the Appellant other than execution against the Appellant's primary residence.

[20] In addition to the foregoing it is also clear that , insofar as the Appellant wishes to base his submission that the failure of Ndebele to allegedly sign the *Nulla Bona* return of the 27th of August 2021 personally, somehow results in a failure by the Respondent to comply with the provisions of subrule 43A(2)a)(ii), completely ignores the existence of the earlier warrant of execution against the movable assets of Ndebele giving rise to the *Nulla Bona* return dated 29th of September 2019. The validity of the 2019 *Nulla Bona* return was also not disputed by the Appellant in his Answering Affidavit.

[21] As to whether or not Ndebele signed the 2021 return or not has no impact whatsoever in this matter. It is not a requirement (*and it was never submitted by the Appellant that it was*) of either the Act or the rules that a warrant of execution, or a return of service in respect thereof, be signed by the judgment debtor. What *is* of relevance is the return itself. In all instances the returns as dealt with in the Respondent's Founding Affidavit and attached as annexures thereto, not only contain the Sheriff's remarks that the warrants of execution in respect of the movable assets of both Ndebele and the Appellant were personally served upon both but also that both had stated that they did not own sufficient movable assets to satisfy the judgment debt. It is trite that the Sheriff's returns of service are *prima facie* proof thereof. If the Appellant wished to seriously challenge the correctness thereof the Appellant bore the onus (*or, at the very least, an evidentiary burden*) to do so. As dealt with above, this issue was never dealt with, at all, in the Appellant's Answering Affidavit. In the premises, the Appellant failed to discharge the onus/evidentiary burden incumbent upon him and the court *a quo* was entitled to accept the contents of the various returns when deciding that the Respondent had considered alternative means of satisfying the judgment debt other than execution against the judgment debtor's primary residence. Finally, as dealt with above, the application was not opposed by Ndebele.

[22] In addition to the foregoing and with regard to other factors which gave rise to the decision of the Magistrate to grant the order, it should be noted that:

22.1 the Appellant was and remains in what may best be described as a "*precarious financial position*". No evidence was placed before the court *a quo* that *any "lucrative agreements with local and international donors"* ever came to fruition or on what basis he would be entitled to the proceeds thereof;

22.2 arising from, *inter alia*, the Appellant continuing to be in arrears with the levy payments and no payments having been made by him or Ndebele in respect thereof (*or in respect of the judgment debt*) the tender made by him to pay R 2 000.00 per month not only amounts to a “puff” but also, considering the amount of the total indebtedness to the Respondent (*which had continued to grow*) of R 222 154.24, there was no possibility of the Appellant being able to discharge that indebtedness as at 1 September 2022 or at any stage in the reasonably near future;

22.3 on the Appellant’s own version there was no available movable property which the Respondent could attach, and which could be sold in order to satisfy the judgment debt, and the Respondent had already executed on the movable property belonging to the Appellant;

22.4 it is clear from the application papers (*subparagraph 8.13 ibid*) that there is substantial equity in the immovable property which would ultimately result in the Appellant receiving a fairly substantial amount of money should the immovable property be sold in execution;

22.5 once again, on the Appellant’s own version, whilst he states that he can afford to pay R 2 000.00 per month (*in respect of arrear levies only*), he fails to disclose what he is presently paying in respect of “*loan finance*” or what income he is actually receiving;

[23] In the premises, this Court finds that the Magistrate did not err when finding that, having regard to the facts of the matter, it was appropriate to grant an order, *inter alia*, declaring the immovable property specially executable in terms of the provisions of subsection 66(1) of the Act read with the provisions of rule 43A of the rules. On the common cause and proven facts of this matter the Magistrate, in the exercise of the court *a quo*’s discretion, was entitled, in terms of, *inter alia*, subrule 43A(8)(g), to order execution against the primary residence of the Appellant, as a judgment debtor, since there was no other satisfactory means of satisfying the judgment debt (*See paragraph [12] ibid*).

Section 26 of the Constitution

[24] Implicit in the finding above is that the Magistrate found that the Appellant's constitutional rights in terms of section 26 of the Constitution were not, on the facts of this matter, in any way infringed. In coming to this finding the Magistrate correctly considered the relevant factors as set out by the Constitutional Court in the matter of *Jaftha v Schoeman & Others ; Van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC)*. The consideration of these factors and the factual findings made by the court *a quo* arising therefrom, are clearly set out in the reasons provided by the Magistrate. In the premises, this judgment will not be burdened unnecessarily by simply repeating those facts and the conclusions reached by the Magistrate. Suffice it to say, this Court agrees therewith.

[25] Whilst our courts recognise that execution against a judgment debtor's primary residence should always be a last resort, it has also been held that it should be accepted that execution in itself is not an odious thing and is part and parcel of normal economic life. (See *Gundwana v Steko Development Corporation & Others 2011 (3) SA 608 (CC)*).

[26] In addition to the foregoing, the Magistrate also took into consideration that the difference between the market value of the immovable property and the amounts owing towards creditors (*including the judgment debt*), resulted in a surplus of R724 248,62. At the same time, as correctly pointed out by the Respondent, the Appellant will no longer be required to make payments in respect of the mortgage bond over the immovable property (*paid from the proceeds of the sale in execution*) or levies in respect of the immovable property. This sum (*or at least a significant amount thereof*) could be utilised by the Appellant towards securing accommodation, thereby relieving any prejudice the Appellant avers he would suffer if the Respondent executed against the immovable property.

[27] Further and in this regard, in order to protect the rights of both parties but with particular reference to the Appellant and Ndebele, the Magistrate included paragraphs 2 and 4 of the order (*Paragraph [3] ibid*). These orders, apart from the procedural safeguards followed by the Respondent in obtaining the default judgment against Ndebele and the Appellant, further entrenched the Appellant's rights in terms of section 26 of the Constitution. In the premises, the Magistrate, in the exercise of the discretion vested in the court *a quo* in terms of subrules 43A(8)(a) and (e), added further conditions to the Respondent being entitled to execute

against the immovable property, thereby further protecting the constitutional rights of the Appellant (*See paragraph [12] ibid*).

Conclusion

[28] In light of the foregoing, it is clear that the Magistrate did not err in finding that the Respondent had taken all reasonable steps to attempt to receive payment of the judgment debt before it applied to the court *a quo* to execute against the primary residence of the Appellant; there was no other satisfactory means of satisfying the judgment debt and that the Appellant's constitutional right to housing had not been infringed. Arising therefrom, the appeal should be dismissed.

Costs

[29] The principles applicable to the issue of costs are trite. Costs should normally follow the result unless there are unusual or exceptional circumstances. No such circumstances were brought to the attention of this Court. In the premises, and in the exercise of its wide and general discretion in respect of the issue of costs, this Court finds that the Appellant is liable to pay the costs of this appeal.

Order

[30] This Court makes the following order:

1. The appeal is dismissed.
2. The Appellant is to pay the costs of the appeal.

BC WANLESS
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 11 June 2024
Judgment: 24 January 2025

Appearances

For Appellant: In person

For Respondent: Adv S McTurk
instructed by Milton Attorneys