



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Appeal Case no: AR483/2023
REPORTABLE

In the matter between:

BODY CORPORATE OF MONTEREY

APPELLANT

and

S'KHUMBUZO ZAKWE

RESPONDENT

JUDGMENT

Olsen J (Shapiro AJ concurring):

[1] The appellant in this appeal is the Body Corporate of the Monterey sectional title complex situate in Richards Bay. In 2022 it issued a summons out of the Empangeni Magistrates Court, in which it claimed payment of a sum of some R26 000,00 from the defendant, Mr Zakwe. Mr Zakwe owns unit 50 in the Monterey development, and the claim was for payment of arrear levies together with interest which had accrued thereon at a compound rate of 24 percent per annum.

[2] The summons was affixed by the sheriff to the principal outer main door of unit 50 as the premises were found to be locked and unattended. After some queries raised by the magistrate had been answered default judgment was granted in favour of the appellant. A warrant of execution against movable property was issued, directing the sheriff to unit 50 for the purpose of its service. The sheriff rendered a return indicating that the process could not be served and that he had been informed by a tenant at the premises, a Mrs Govender, that Mr Zakwe had left the given address. The appellant then launched an application in terms of Rule 43A of the Magistrates' Court Rules for leave to execute against the unit. That application was served on the tenant, Mrs Govender. (In terms of the management rules of the development the address for delivery of legal process is the unit.) The magistrate refused the application. That generated the present appeal. The sheriff served the Notice of Appeal by pinning it to the outer door of unit 50 because he found the premises locked and unattended. Mr Zakwe played no part in the appeal.

[3] To complete the broad outline of the matter which served before the magistrate the following facts which emerge from the founding papers in the application in terms of Rule 43A bear mention.

- (a) The value of unit 50 is about R680 000.00.
- (b) Unit 50 is not mortgaged.
- (c) No amounts were owing (at the time) to the local authority in respect of rates and service charges.

[4] Unfortunately the reasons provided by the Magistrate in term of Rule 51(1) for the order she made dismissing the application are in some respects something of a

muddle. Having said that, I think it is fair to say that the magistrate's decision rested on a finding she made that the three returns rendered by the sheriff were not sufficient to either prove or disprove the proposition that unit 50 was the primary residence of the defendant. Having decided that, the magistrate pointed out that the requirements laid down in Rule 43A for an order that a primary residence of a judgment debtor may be sold in execution had not been established by the appellant and that, as a result, the application had to be dismissed.

[5] The reason for the magistrate's emphasis on the question as to whether unit 50 was Mr Zwake's primary residence is not difficult to discern. In the founding affidavit there was already a submission that, because it had not been established that the unit was his primary residence, the court's discretion to consider and fix a reserve price was not engaged. In the heads of argument submitted to the magistrate in support of the application one sees a heading: "Is there a need for judicial oversight at all if the respondents do not live in the property in question?". An argument was then advanced with reference to certain authorities for the proposition that because it had not been established that this was a case of the type considered in *Jaffha*, the answer to that question is in the negative. Somewhat selective references were made to cases such as *Mkhize v Umvoti Municipality and others* 2012 (1) SA 1 (SCA) without, in that instance, referring the magistrate to paragraph 26 of the judgment which reads as follows.

"The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaffha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to

understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional. Following that simple principle would have avoided the confusion cause by a number of judgments.”

[6] The appellant presented the magistrate with a copy of a full bench decision of the Gauteng Division, Johannesburg delivered in May 2021, which appears not to have been reported, nor preserved on the Safflii internet site. It is *The Body Corporate of Bushmill Sectional Title Scheme vs Kgomo*, Case Number 3039/2020. This passage from paragraph 12 of the judgment was quoted in the appellant’s heads of argument.

“In other words, Rule 43A is there to protect the primary residence of the judgment debtor, it is not there to assist it from avoiding its legal duty to relinquish (*sic*) the debt. The protection is over the primary residence and not any other residence of the judgment debtor.”

The magistrate was treated to a lecture on the doctrine of *stare decisis*, rounded off with the following submission.

“It is respectfully submitted that the court is bound by the Bushmill matter, whether it agrees therewith, or not.”

[7] The heads of argument submitted to us on appeal follow much the same line as those with which the magistrate was confronted. We have also been referred to the judgment in *Bushmill*, and on that authority asked to conclude that “the discretion of the court *a quo* as contained in Rule 43A of the Magistrates Court Rules is ... not triggered”, because the respondent does not reside in the unit.

[8] That aside, it is argued on behalf of the appellant that even if the magistrate had a discretion to investigate, the relevant facts fall exclusively within the knowledge of the respondent, and that it is for the respondent to raise such facts. It is put this way in the heads of argument.

“It is for the respondent to demonstrate that he has other reasonable means to satisfy the judgment. It is for the respondent to disclose his financial position. It is for the respondent to disclose whether he is employed, or not and if employed for what salary and whether he has other sources of income as this information falls peculiarly within his knowledge and is not readily available to the applicant.”

[9] The question which these submissions raise is of course whether the respondent had any notice of the proceedings, as without such notice the absence of information from him on such matters is of no significance.

[10] The issue as to whether there had been proper service of the application, that is to say as to whether the court could take it that the respondent had notice of the proceedings, was not raised in the heads of argument submitted to the magistrate, was not dealt with by the magistrate in her reasons for judgment, and was not raised in the heads of argument delivered to this court. It was raised by this court during the course of oral argument and dealt with. In my view this issue is decisive of this appeal. No authority is required for the proposition that an appeal lies against the order of a court *a quo*, and not against the reasons given for the order. If the order was correct for reasons not given by the court *a quo*, the appeal must fail.

[11] Rule 43A (3) provides as follows.

“(3) Every notice of application to declare residential immovable property executable shall be -

...

(d) Served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.”

The same provision is contained in Rule 46A of the Uniform Rules. Its interpretation in this Division is unquestioned. An applicant for an order authorising execution against any residential immovable property must attempt to achieve personal service upon the judgment debtor. If it cannot be achieved then an application for what is in effect substituted service (“service in any other manner”) must be made. The applicant for such relief must set out all information available to, or which ought reasonably to be available to, the applicant concerning the whereabouts of the judgment debtor, and must propose the alternative modes of service which the court is asked to sanction. The founding affidavit in such an application must disclose why it should be accepted that personal service is not reasonably possible, and the basis upon which it is argued that such alternative modes of service are likely to bring the proceedings to the attention of the judgment debtor. If satisfied, the court will order such “service in any other manner”. Something less than personal service achieved otherwise than in accordance with a prior order of court contemplated by the proviso to the subrule is not acceptable. The wording of the rule makes it clear that the prior sanction of the court for such non-personal service is required.

[12] When this issue was raised in argument before us counsel for the appellant referred us to the judgment in *Bushmill*. The facts in *Bushmill* were not dissimilar to those present here. Judgment had been granted against an absent sectional title

holder for unpaid levies. The unit in question had been let to a tenant. Execution against movable property proved unsuccessful. The warrant of execution against the unit was served on the tenant. The judgment creditor (the body corporate) sought the courts sanction of execution against the unit in terms of Rule 43A of the Magistrates Court rules. As recorded in paragraph 7 of the judgment

“The learned magistrate came to the conclusion that personal service, alternatively non-personal service authorised by the court, was essential for the court to entertain the application. The applicant in this case had done neither. It also refused the learned magistrate’s offer to bring an application to court to serve “in any other manner” other than personally on the respondent.”

The issue in the appeal in *Bushmill* was whether Rule 43A imposed a duty on the applicant to effect personal service, or to seek authorisation for an alternative form of service.

[13] The court in *Bushmill* recognised that the language employed in subrule 3(d) conveys that in “every” application to declare residential immovable property executable there must be personal service, or otherwise service executed in terms of an order granted by the court authorising such other service. The language draws no distinction between residential property which is the primary residence of the owner and residential property that is not.

[14] Having done that, the court in *Bushmill* pointed out that if a judgment debtor or his or her family were to be rendered homeless, their constitutionally protected right under section 26 of the Constitution could be violated. Thus, argues the judgment, the required exercise of caution before ordering that a primary residence be declared executable. That led to the conclusion, in the passage quoted earlier in this judgment,

that Rule 43A is there to protect the primary residence of the judgment debtor and not any other residence of the judgment debtor.

"[13] It is on this purposive interpretation that the question of whether personal service is obligatory in a case where an order for the non-primary residence of a judgment debtor to be made specially executable is sought. In my view, clearly not. There is no constitutionally protected right that is at risk of being violated by such an order. Such an order was sought in the present case."

The appeal was upheld and an order made declaring the respondents sectional title unit executable.

[15] In my respectful view the decision in *Bushmill* was clearly wrong. Rule 43A (1) provides that "[T]his rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor"; the word "whenever" signifies in all cases. Subrule (2)(a) obliges the court to establish whether the property is the primary residence of the debtor, and to consider alternative means of satisfying the judgment if it is; and to refuse to authorise execution unless, after considering all relevant factors, the court considers such execution against a primary residence to be warranted. In like manner subrule 8(b) provides that execution against the primary residence of the judgment debtor can be granted if there are no other satisfactory means of satisfying the judgment debt. Otherwise, all the provisions of Rule 43A apply to residential immovable property, whether or not it is the judgment debtor's primary residence. The rule is carefully crafted to convey that in clear language, and I am unable to see how a purposive approach to its construction can be taken to nullify the opening proclamation of the rule, that it applies whenever execution is sought against "residential immovable property".

[16] In my view this analysis of Rule 43A of the Magistrates' Court Rules accords with the analysis of Rule 46A of the Uniform Rules set out in paragraphs 74 – 76 of the judgment in *Bestbier and others v Nedbank Limited* [2024] JOL 64354 (CC). Of particular importance in the present context is this statement in paragraph 75 of the judgment in *Bestbier*.

“The importance of judicial oversight over all residential immovable property, and not only primary residential immovable property is that it would be risky to leave it to the judgment creditor to determine whether the property is used as primary residence without this question being ventilated or determined by a court.”

It is difficult to see how the issue can be properly ventilated without notice to the judgment debtor; which is why personal service cannot be dispensed with merely because, on the face of it, it appears that the residential property may not be the primary residence of the judgment debtor.

[17] In my view the right of the judgment debtor to be heard is not confined to subjects such as the reserve price, or other conditions of sale which might be stipulated by the court hearing an application under Rule 43A. Whilst the judgment debtor's absence from the property in question at the time of service might be an indicator, and sometimes a strong one, that it is not his primary residence, that is not necessarily the case. If a person vacates her sectional title unit to allow her aged and unwell parents to occupy it because, for the time being, their need is greater, does that mean that the unit, which is the only residential accommodation she owns, is no longer her primary residence? Does the primary residence of an artisan lose its status as such if he leaves it for a year or so to work on a far-flung project, and lets it in the meantime? The status of residential property is a factual issue, and one upon which

the judgment debtor is entitled to be heard. There is every reason to insist on personal service if it can be achieved.

[18] In the result the order made by the learned magistrate in the court *a quo* cannot be faulted. One supposes that she may have chosen not to justify her order upon the basis that personal service was required, because she regarded herself as bound by the decision in *Bushmill*, to which she had been referred.

[19] The following order is made.

The appeal is dismissed.


Olsen J


Shapiro AJ

Case Information:

Judgment reserved:
Judgment delivered:

11 October 2024
29 November 2024

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