



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 24 February 2025

Case No. 2024-067958

In the matter between:

PINEHURST LODGE BODY CORPORATE

Applicant

and

JANINE LAETITIA FOUCHE

First Respondent

ABSA BANK

Second Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

CITY OF JOHANNESBURG

Fourth Respondent

Summary

The High Court will not provide process-in-aid of enforcement of a Magistrates' Court money judgment where the Magistrates' Court has the power necessary to order and oversee the execution of that judgment. Process-in-aid should not be provided where a litigant is merely critical of the way in which the Magistrates' Court chooses to exercise its powers of execution.

JUDGMENT

WILSON J:

- 1 The respondent, Ms. Fouche, owns a unit in the sectional title scheme out of which the applicant, Pinehurst, is constituted. On 23 October 2023, Pinehurst obtained judgment against Ms. Fouche in the Magistrates' Court for just under R170 000 in unpaid levies and other charges due to Pinehurst in terms of the body corporate's management rules and the resolutions made under them.
- 2 On 12 March 2024, the Sheriff sought to execute the judgment against Ms. Fouche's moveable property. Ms Fouche told the Sheriff that she had neither money nor disposable property capable of satisfying the judgment. The Sheriff accordingly issued a *nulla bona* return, confirming that he could find nothing belonging to Ms. Fouche that could be sold to settle her debt. It can safely be inferred from the Sheriff's return that Ms. Fouche's unit is her primary residence. Pinehurst does not suggest otherwise.
- 3 Pinehurst then sought an order in the Magistrates' Court authorising it to execute the judgment debt against Ms. Fouche's home. Pinehurst gives almost no detail of these efforts, but it appears that they have to date been unsuccessful. Pinehurst states that it faced Magistrates who flatly refused to consider execution against Ms. Fouche's unit and who caused "extreme delay in the process through multiple postponements and additional requirements, not in terms of the Rules" (Founding Affidavit of Kim Bam, paragraph 24).
- 4 Pinehurst then instituted this application, which was enrolled before me in my unopposed motion court on 19 February 2025. Pinehurst once again seeks leave to execute its Magistrates' Court judgment against Ms. Fouche's unit. It

relies on the common law doctrine of “process-in-aid”, which permits a superior court to enforce the judgment of a lower court, where the lower court’s judgment “cannot be effectively enforced through its own process” (see *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) (“*Bannatyne*”), paragraph 20 and the authorities cited there). Because the High Court’s remedial powers are generally more extensive than those of the Magistrates’ Court, those powers may be deployed to ensure the enforcement of a Magistrates’ Court judgment where a Magistrate’s efforts to do so have failed.

5 In *Van Den Bos NO v Mohloki* 2022 (2) SA 616 (GJ) Gilbert AJ held that this court has the discretion to provide process-in-aid of execution of a Magistrates’ Court money judgment by declaring a judgment debtor’s primary residence specially executable for the judgment amount secured in the Magistrates’ Court. Gilbert AJ declined, however, to order special execution in the matters before him, having found that the applicant had adduced no facts which could justify the exercise of his discretion to do so.

6 At the level of principle, Gilbert AJ is of course correct. This court does have the discretion to provide the kind of process-in-aid he identified. However, for the reasons that follow, I struggle to think of a situation where the exercise of that power would be appropriate.

The Magistrates’ Court can execute its own money judgments

7 In the first place, the decision in *Bannatyne* makes clear that process-in-aid ought only to be deployed in circumstances where the Magistrates’ Court cannot effectively enforce its own judgments. In this case, there can be no dispute that the Magistrates’ Court has the full range of powers necessary to

order execution of a judgment debt against a debtor's primary residence. Section 66 of the Magistrates' Court Act 32 of 1944 and Rules 43 and 43A of the Magistrates' Court Rules afford the Magistrates' Court all the powers it needs to enforce its own judgments against the immovable property of a judgment debtor. Save for the limits on the Magistrates' Court's monetary jurisdiction, those powers are in almost every material respect identical to the powers this court has to oversee execution of its own money judgments.

Appeal in disguise

8 Secondly, Pinehurst's complaint is not that the Magistrates' Court cannot enforce the judgment debt in this case. It is that Pinehurst has not been able to persuade a Magistrate to do so. Pinehurst's case in this respect is laconic. It provides no particulars of when it applied to execute against Ms. Fouche's unit, how often it did so, the reasons given for postponing or refusing its application, or why it has not been able to remedy the defects in its application the Magistrates' Court has presumably identified. This case has all the hallmarks of an appeal against or review of the exercise of a magisterial power, save that no grounds of review or appeal have been set out.

9 Process-in-aid is not meant to permit an appeal in disguise. Nor is it meant to provide a disgruntled litigant with avenues of redress against what that litigant perceives to be institutional malaise in a lower court. I cannot foresee the circumstances in which this court could properly incline to usurp a lower court's powers of execution merely because a litigant is critical of the way the lower court chooses to exercise those powers. There would have to be

demonstrable and institution-wide breakdown before that course of action could constitute a legitimate option.

- 10 Even at its most plaintive, Pinehurst's criticism of the Magistrates' Court does not suggest ineptitude of this type. At bottom, Pinehurst's case is that successive Magistrates have not seen things Pinehurst's way. If those Magistrates fell into error, Pinehurst's remedy is to review or appeal the relevant decisions. The invocation of process-in-aid is inappropriate.

The High Court's power to refuse execution against a primary residence

- 11 Thirdly, the invocation of process-in-aid has the potential to hobble this court's discretion to decline to execute a money judgment against a judgment debtor's primary residence. An essential part of the exercise of that discretion is to consider whether the debt might be payable over time, without having to take the drastic step of executing against a debtor's home (see *Jaftha v Schoeman* 2005 (2) SA 140 (CC), paragraph 59 and *Standard Bank of South Africa v Saunderson* 2006 (2) SA 264 (SCA), paragraph 20). The Magistrates' Court Act explicitly recognises such a possibility, and provides for a Magistrate to make an order for repayment in instalments (see section 73 of the Act). This is presumably because judgment debts executable in the Magistrates' Court are smaller and more likely to be capable of settlement over time. In this case, there is no evidence before me that this possibility has been explored.

- 12 The more fundamental point, however, is that, absent an application to review or appeal the judgment debt itself, this court has limited, if any, power to suspend the money judgment or interfere with the manner of its settlement. Without such a power, an application in this court to execute a Magistrates'

Court money judgment is more likely to amount to a *fait accomplis* than an invitation to exercise a discretion.

- 13 The link between the exercise of the discretion to refuse execution against a primary residence and the grant or refusal of the underlying money judgment was recognised by the Full Court in *Absa Bank v Mokebe* 2018 (6) SA 492 (GJ) ("*Mokebe*"). In that case, the Full Court required that the application for a money judgment on a mortgage bond and the application for leave to execute against mortgaged property being used as a primary residence should generally be heard and determined simultaneously. This is in part because the grant of a money judgment separately from an order for special execution risks ruling out the possibility of avoiding execution by finding other means to pay the debt due (see *Mokebe*, paragraph 22).
- 14 In this case, Pinehurst does not seek special execution on a mortgage bond. It seeks an order declaring Ms. Fouche's property executable because execution against her movables has failed to satisfy the judgment debt. However, the underlying concerns are the same. If the money judgment against Ms. Fouche had been sought and granted in this court, the Judge considering the application for leave to execute against Ms. Fouche's home would at least have the power, under Rule 45A, to "suspend the operation and execution" of the money judgment "for such period as it may deem fit". It is not clear to me that the court has that sort of power when asked to provide process-in-aid. The basis of an application for process-in-aid is that the underlying judgment is final and not susceptible to interference. In applications to declare primary residences specially executable, that assumption does not

hold. It is always at least possible that the money judgments may be refused or suspended, or that the application for it could be postponed in order to give the debtor the opportunity to prevent execution against their home by repaying the debt in some other way.

- 15 For this additional reason, it will seldom be appropriate to enforce a money judgment granted in the Magistrates' Court by asking the High Court for leave to execute against the judgment debtor's home.

The *Thobejane* decision

- 16 Mr. Bava, who appeared for Pinehurst, relied upon the decision of the Supreme Court of Appeal in *Standard Bank v Thobejane* 2021 (6) SA 403 (SCA), but that decision is not directly relevant. *Thobejane* is authority for the proposition that this court has no discretion to refuse to entertain a matter merely because it falls within the concurrent jurisdiction of the Magistrates' Court. In this case, there is no question of my declining jurisdiction to entertain Pinehurst's case. Rather, having accepted jurisdiction to decide Pinehurst's application, I decline to exercise my discretion in Pinehurst's favour.

Order

- 17 For all these reasons, the application is dismissed.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on

Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 February 2025.

HEARD ON: 19 February 2025

DECIDED ON: 24 February 2025

For the Applicant: WA Bava
Instructed by Bam Attorneys