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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 18516/2021

In the matter between:

MAS-OODAH SHABUDIN

Applicant

and

NEDBANK LIMITED

First Respondent

WARREN BEYER

Second Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

SHERIFF OF THE HIGH COURT, GOODWOOD

Fourth Respondent

Coram: Justice J Cloete

Heard: 30 January 2025

Delivered electronically: 18 February 2025

JUDGMENT

CLOETE J:

- [1] This is an application in which the applicant seeks the following relief: (a) suspending the order granted under the above case number on 7 February 2023 (“the summary judgment order”); (b) cancelling or setting aside the warrant of execution issued by the registrar pursuant to the summary judgment order; (c) declaring the subsequent sale in execution to the second respondent on 12 March 2024 of the immovable property registered in the applicant’s name and situated at [...] K[...] Road, Thornton (“the immovable property”) null and void; and (d) costs in the event of opposition. The first respondent (“Nedbank”) opposes the relief sought. The remaining respondents have not participated in these proceedings.
- [2] The matter has a long history which has been set out fully in the papers. For present purposes it is only necessary to deal with those facts directly relevant to determination of the issues before me. To this it should be added that at a stage the applicant had legal representation, but her attorney of record withdrew prior to the hearing. She was assisted by her brother, and I stood the matter down for an hour to enable her to prepare, given that she had not filed heads of argument. She informed me upon resumption that she was ready to address the court, and the hearing thus proceeded.
- [3] The summary judgment order has not been appealed and it accordingly remains of full force and effect. In terms thereof judgment was granted against the applicant in favour of Nedbank (which relied on its security, being a mortgage bond registered over the immovable property pursuant to the conclusion of a written loan agreement between itself and the applicant, and subsequent breach thereof by the applicant) for: (a) payment of R2 572 065.77, interest and attorney and client costs; and (b) declaring the

immovable property specially executable subject to a reserve price of R1.7 million. The order also records that:

'The Respondent is notified that in terms of s 129(3) of the National Credit Act 34 of 2005 the Respondent may, at any time prior to the transfer after sale in execution of the Property (and before cancellation of the agreement) reinstate the credit agreement by paying to the Applicant all amounts that are overdue together with the Applicant's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement, which amounts, charges and costs the Applicant must on enquiry from the Respondent furnish to the Respondent.'

- [4] The immovable property was sold in execution on 12 March 2024 to the second respondent for R1 990 000. Transfer has not yet been registered in the name of the second respondent as a result of the present application. During argument the applicant informed me that her oral submissions in support of the relief sought were in accordance with those in her founding affidavit, and I thus summarise them as follows.
- [5] According to the applicant, after summary judgment was granted, she made *'frantic efforts'* to resolve the matter since Nedbank had placed the immovable property on auction. At the time she requested Nedbank to restructure the loan agreement *'as the arrears were growing and I would find it difficult to pay the bank'*. She was also trying to make payments to reduce the debt. Her version is further that her negotiations with Nedbank culminated in an agreement in August 2023 *'wherein I made a proposal to pay an amount that would cover more than 50% of the arrears at that time. The proposal was accepted, though it had some outlandish demands attached to it'* by Nedbank. In August 2023, she paid Nedbank R298 757.97; in October 2023, R38 000 and in November 2023, R37 000.
- [6] The applicant also alleges that in January 2024, she advised Nedbank that she would be able to make a lump sum payment at the end of March 2024 as

she was awaiting funds that her family were assisting her with. She was thus surprised *‘when sometime in February 2024 I was advised that the property would be put on auction again. I had thought that with the payments that I had made to substantially reduce my arrears the First Respondent would be reasonable. That was not the case’*. She maintained that at the time Nedbank *‘was not budging by way of negotiations’*. She then indicated to Nedbank that she would be willing to participate in its assisted sale program but the response received was *‘filled with outlandish demands for payment of 50% of the arrears before the assisted sale could be considered. This, in all fairness, defeats the very purpose of the process’*.

- [7] According to the applicant, having realised that Nedbank was negotiating from *‘an unreasonable viewpoint’*, she then obtained her own purchaser who made an offer to Nedbank to purchase the property for R2.4 million, which was however rejected. The applicant annexed the offer to purchase to her founding affidavit. It is in fact a deed of sale dated 7 March 2024, reflecting the applicant as seller and a Mr Waleed Bukhari as purchaser. The purchase price is reflected as R1.8 million *‘excluding costs’*; is subject to the purchaser obtaining a loan for the full amount of the purchase price within 14 days from date of last signature or such other extended period as the parties might agree in writing; contains a special condition that *‘client will sign A.O.D.’*; and is accompanied by a “pre-approval certificate” issued by MasterFin Bond Originators that mortgage pre-approval had been granted to the purchaser for an amount not exceeding R3.5 million, but subject to the following terms and conditions in bullet point form:

- ‘ • Banks criteria*
 - Satisfactory Bank Valuation*
 - Loan term 240 months*
 - Subject to clear credit record*
 - Satisfactory payment profile*
 - Affordability’*

- [8] The applicant's complaint is that, notwithstanding the foregoing, the sale in execution proceeded. The grounds she advances for suspension of the summary judgment order are that: (a) the offer made by the prospective purchaser of R2.4 million was reasonable in the circumstances and would not result in her having a huge shortfall in the amount owing to Nedbank; (b) the latter's attorney demanded guarantees from this *'potential purchaser'* and was informed these would be provided as soon as possible, but Nedbank nonetheless went ahead with the sale in execution; (c) the property was sold for R1.8 million in execution, an amount substantially lower than the applicant's purchaser and *'no doubt lower than what would have been obtained through the assisted sale process'*; and (d) *'Nedbank's actions were all in bad faith, causing the Applicant prejudice'*.
- [9] In Nedbank's answering affidavit a very different picture emerged. Nedbank's deponent set out at some length all of the indulgences granted to the applicant after she breached the loan agreement way back in March 2021 and up until the granting of the summary judgment order. I do not deal with them herein since they would all have been taken into account by the court prior to granting that order. However what is relevant is that the applicant concluded the loan agreement with Nedbank on 12 November 2019; the mortgage bond was registered in favour of Nedbank over the immovable property on 6 December 2019; and the applicant fell into arrears in respect of her loan account payments to Nedbank in approximately March 2021 (i.e. 15 months after the bond was registered). Moreover, subsequent to the granting of the summary judgment order, the applicant offered to pay R100 000 at the end of March 2023 but would not commit to an arrangement beyond this; the promised payment of R100 000 was never received; the applicant then offered to pay R100 000 by the end of May/the first week of June 2023, but again no such payment was made. She also made no payments whatsoever in May, June and July 2023. In July 2023, she indicated that she had signed a mandate with Claremart to sell the immovable property, but no offer to purchase was received by Nedbank from either the applicant or Claremart thereafter.

[10] Nedbank's version is further that on 21 August 2023, the applicant indicated that she was in a position to make a payment '*substantially*' higher than previously offered, but this notwithstanding, she again failed to do so. A sale in execution was scheduled for 29 August 2023. The applicant was informed that, in order for the sale in execution to be cancelled, she would be required to make a lumpsum payment of 75% of the arrears with the remaining 25% to be paid over 6 months together with the loan instalment. The applicant did not accept this, but instead offered to pay 50% of the arrears together with certain payments for 3 months thereafter, while Claremart had a mandate to sell the property. The applicant had emphasised that her offer was based on what she '*could ensure the bank comfortably*'. Nedbank accepted this arrangement (no outlandish demands were attached to this acceptance as alleged by the applicant), and upon receipt of payment of 50% of the arrears, the sale in execution scheduled for 29 August 2023 was cancelled. (It is undisputed that on 6 July 2023 the applicant's arrears under the written loan agreement had risen to R530 442.70 (a significant sum). The payment of R298 757.97 made by the applicant during August 2023 (being roughly 50% of the arrears) then resulted in cancellation of the sale in execution).

[11] Nedbank also alleges that on 25 August 2023 its attorney enquired whether the applicant would be interested in a restructure of her loan account or whether she still wished to sell the property. The applicant indicated that she was open to a restructure and enquired how it would work. She was reminded that she had been informed of the requirements for restructure on a previous occasion, but was again informed thereof. She was also again provided with documents for completion necessary to consider a restructure as well as the NAS program brochure (i.e. the Nedbank Assisted Sale program). No response was received from her and she did not provide the requested documents. In response to a follow up email from Nedbank's attorney, the applicant only provided proof of a payment and none of the required documents. On 31 October 2023, she made a further payment, but less than what she herself had previously proposed and which Nedbank had accepted. She made no payment in November 2023 as she alleged.

- [12] Nedbank's version is further that thereafter the applicant also persisted in her failure to provide the documents required for a restructuring of her account. Accordingly, in December 2023, she was informed that she had breached the arrangement and that a new date for a sale in execution would be obtained. By this stage the arrears on the applicant's home loan account had again increased to R302 493.32. On 5 December 2023, the applicant requested time '*to remedy this*' by 8 December 2023. She confirmed that she would '*certainly settle*' December's instalment by 8 December 2023. No payment was received. On 22 February 2024, the applicant requested the '*arrears settlement*'. She was informed that her arrears then stood at R397 451.95, and she would be required to pay that amount plus legal costs by 12h00 on 8 March 2024 in order to cancel the sale in execution scheduled for 12 March 2024. On 5 March 2024, the applicant proposed to make payment of 50% of the arrears for the second sale in execution to be cancelled, plus a restructuring of the arrears '*over a period*'. Given the history of the matter, Nedbank was not agreeable thereto.
- [13] Thereafter, on 6 March 2024, Nedbank's attorney received correspondence from the applicant's former attorney in which she (for the first time) clearly indicated her willingness to enter the NAS program. However, on 8 March 2024, the offer to purchase the immovable property to which I have previously referred, and which was annexed to the applicant's founding affidavit, was instead received, coupled with a request that Nedbank stay the sale in execution. The offer to purchase was problematic for Nedbank. It was not accompanied by any form of security or guarantee for the purchase price or costs; the sale was subject to bond approval for the full amount of the purchase price; and the "pre-approval" certificate provided did not constitute bond approval either. In any event, the purchase price was not sufficient to cover the applicant's indebtedness to Nedbank and would leave a significant shortfall.
- [14] Despite all this, on 11 March 2024 (i.e. the day before the second scheduled sale in execution), the applicant was given yet another opportunity. In a letter addressed to her attorney she was advised that, should she wish to proceed

with the NAS program, she would be required to pay 50% of the arrears plus the monthly loan instalment for 3 months, and would also be required to sign the NAS mandate. At this stage, the applicant had made no payments on her home loan account since October 2023. The applicant's only response was a revised offer to purchase the property for R2.4 million. This offer to purchase (again accepted by the applicant) was made by the same Mr Bukhari, and was in identical terms to the previous written offer (save for the handwritten amendment to the purchase price), and accompanied by the same so-called pre-approval certificate previously issued by MasterFin. Nedbank had the same difficulties with this offer as before.

- [15] The applicant (through her attorney) took issue with what she considered to be Nedbank's '*unreasonable demand*', and claimed that she had '*no issues with signing the ordinary NAS mandate*', notwithstanding the undisputed fact that she had never signed the mandate before, despite it being provided to her on the first occasion as far back as August 2022. The sale in execution thus proceeded on 12 March 2024 and the immovable property was purchased by the second respondent for R1 990 000 (being an amount in excess of the reserve price of R1.7 million, as well as the initial offer made by Mr Bukhari of R1.8 million which the applicant herself had found to be acceptable).
- [16] In considering the respective versions of the applicant and Nedbank, there can be little doubt that Nedbank's version must be accepted over that of the applicant's, given that much of Nedbank's version is supported by independent documentation and correspondence annexed to its answering affidavit. It is thus against this factual background that I proceed to consider whether the applicant is entitled to a suspension of the summary judgment order, from which the consequential relief she seeks would follow.
- [17] Uniform rule 45A provides that, in relation to orders of first instance (such as the summary judgment order in the present matter), a court may, on application, suspend the operation and execution of any order '*for such period*

as it may deem fit'. In *Stoffberg NO and Another v Capital Harvest*,¹ Binns-Ward J comprehensively analysed our jurisprudence on this issue. The following principles may be distilled from that judgment.

- [18] First, to the extent that there is a “general principle”, it is that a court will be inclined to suspend the operation and/or execution of an order if real and substantial injustice would otherwise result.² Examples (not an exhaustive list) are where the underlying *causa* of a judgment debt is disputed, or no longer exists, or where an attempt is made to use the levying of execution for ulterior motives.³ Second, rule 45A is not a self-standing source of the court’s authority, but rather a restatement of its common law discretionary power, which in turn is an instance of its authority to regulate its own process (in terms of s 173 of the Constitution).⁴
- [19] Third, the power to suspend, being a judicial one, must be exercised judicially. It will thus be fact specific in order to determine ‘*whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension [the court] might be persuaded to allow will be granted*’.⁵ A stay of execution should not be granted upon a mere plea *ad misericordiam* (i.e. an appeal for pity): ‘*a stay of execution is not to be had on flimsy grounds, merely to accommodate an alternative payment plan that the judgment debtor might be able to offer... the cases make it clear that the remedy is not just for the asking*’.⁶
- [20] Applying these principles to the specific facts of this matter, the applicant’s complaint is essentially that, in refusing to allow her yet a further opportunity to meet her (uncontested) obligations in a manner “suitable” to her, Nedbank is acting in bad faith and using the execution process for an ulterior motive. It is difficult to discern, on the applicant’s own version, what that ulterior motive

¹ [2021] ZAWCHC 37 (2 March 2021).

² At para [17].

³ At para [25].

⁴ At para [26].

⁵ Also at para [26].

⁶ At para [28].

might be. It is however clear that Nedbank has bent over backwards to accommodate the applicant. It has given her numerous opportunities to accept, and comply with, various alternatives available to her. It has even accepted one of her own proposals which she then proceeded, without explanation, to breach. Furthermore, the applicant has not played open cards with this court. She attempted to portray a picture which was inaccurate and skewed in her favour.

[21] In addition, the applicant effectively seeks a permanent stay of judgment and execution which, if granted, would mean that Nedbank will potentially never be able to recover payment of the sum owing to it. That sum is a substantial amount. The applicant only purchased the immovable property towards the end of 2019, and fell into arrears as early as March 2021. Nedbank has spent the past almost 4 years attempting to call up its security for which the applicant willingly provided her immovable property. In addition, even if one were inclined to grant a temporary suspension of the summary judgment order (which I am not), this court is in no position to determine suitable terms, particularly given the applicant's repeated failure to abide by arrangements reached including adhering to her own proposals. In reality, the applicant asks for a stay of execution upon a mere plea for pity or mercy. *Stoffberg NO* makes it clear that a suspension should not be granted on this basis.

[22] I am alive to the fact that the immovable property is, as claimed by the applicant, her primary residence, where she resides with her family, but that is not an issue relevant for purposes of determination of this matter vis-à-vis Nedbank. As I explained to the applicant during argument, the second respondent, once he has taken transfer of the immovable property, will be obliged to follow the procedural requirements of PIE⁷ in the event that the applicant and her family members refuse to vacate once he becomes the registered owner thereof. Finally, as far as costs are concerned, there is no good reason why they should not follow the result, and that the applicant should pay them on the scale agreed upon in the written loan agreement.

⁷ Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

[23] The following order is made:

The application is dismissed with costs on the attorney and client scale, including the costs of counsel and all reserved costs orders.

J I CLOETE

For applicant: In person

For 1st respondent: Adv N Van Zyl

Instructed by: Herold Gie Attorneys (P A Le Roux)

No opposition or appearance for second to fourth respondents.