IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 15476/2023P

In the matter between:

NGQONDI AVUYA ZINATHI MFOLOZI	**APPLICANT**

and

FARM HOME OWNERS ASSOCIATION	**FIRST RESPONDENT**
YUSUF MOOSA	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS, PIETERMARITZBURG	**THIRD RESPONDENT**
RAY NKONYENI MUNICIPALITY	**FOURTH RESPONDENT**

ORDER

In the premises the following order is made:

1. The applicant's application to set aside the sale of the immovable property situated at ERF 1[...] Shelly Beach is dismissed.
2. The applicant's application succeeds to the extent that the first and third respondents are interdicted from transferring the immovable property located at ERF 1[...] Shelly Beach to the second respondent for a duration of three months. This will allow the applicant to follow the correct procedure concerning the order declaring the property executable by the Port Shepstone Magistrates' Court.
3. There is no order regarding costs.

JUDGMENT

Mathenjwa J

Background

[1] This is an application by Ngqondi Mflozi (the applicant) requesting the court to set aside the sale agreement between the Farm Owners Association (the first respondent) and Yusuf Moosa (the second respondent) concerning the plot located at ERF 1[...], Shelly Beach (the immovable property), as well as to prohibit the first and third respondents from transferring the property to the second respondent. The applicant owned the property situated within the Farm Owners Association, Farm Estate in Shelly Beach. The second respondent owns another property in the same Association and is a neighbour of the applicant.

[2] On 20 October 2022, an attorney representing the first respondent sent a letter to the applicant demanding payment of outstanding arrear levies owed by her to the first respondent, totalling R13 914.93. The applicant communicated to the attorney that she had lost her job and was unable to pay these levies while actively seeking new employment. Following this communication, the first respondent initiated legal proceedings at the Port Shepstone Magistrates' Court, serving summons at the applicant's chosen *domicillium citandi et executandi* address. The applicant did not respond to the summons, resulting in a default judgment being awarded against her and in favour of the first respondent. Subsequently, a writ of execution was issued by the Court for seizing movable assets. After receiving a *nulla bona* return from the sheriff indicating no movable assets were available for attachment, the first respondent obtained an order from the Court declaring the immovable property executable .

[3] On 9 July 2024, the applicant emailed the attorney representing the first respondent to propose a settlement for outstanding levy arrears, suggesting a monthly payment of R5 000. The applicant indicated that she had secured new

employment and was able to maintain this monthly payment. However, the first respondent's attorneys rejected her proposal. Subsequently, on 17 October 2024, the applicant learned that her immovable property had been sold to the second respondent when she called him to enquire about his interest in purchasing it. Previously, the second respondent had approached her with an offer to buy the property, which she had declined at that time. The second respondent informed the applicant that the property was sold to him in execution for R352 000 and stated that as the purchaser, he was responsible for additional arrear rates amounting to R26 339.18 and arrear levies totalling R151 868.28.

Parties' contentions

[4] The applicant asserts that on 26 August 2024, she made a payment of R10 000 towards settling the arrears and proposed a monthly instalment of R5 000 for this purpose; however, this offer was refused by the first respondent's attorney. On 22 October 2024, the applicant contacted her attorney regarding the sale of the immovable property; upon enquiry with the first respondent's attorneys, she was informed that the property had been sold for R352 000 to the second respondent. The applicant argues that she did not receive any notification for sale of the property and claims that the magistrate failed to correctly apply legal procedures when issuing an order declaring her property executable.

[5] The second respondent raised preliminary objections and argued that the order being sought is improper because while it seeks to prevent transfer of ownership of the property to him, the applicant has not joined the sheriff who is authorised to execute such a transfer in these proceedings. Furthermore, the second respondent pointed out that no application for rescission of the default judgment has been filed in the Magistrates' Court nor has there been an appeal against the said judgment. The second respondent maintains he is a bona fide purchaser of the immovable property and contends that there is no evidence presented by the applicant to demonstrate any mala fides on his part.

[6] The applicant acknowledges that she has neither rescinded nor appealed the judgment issued by the magistrate, yet asserts that this court has the authority to utilise its inherent jurisdiction to grant her the requested relief. After the conclusion of arguments from both parties, the court reserved its judgment.

[7] This case presents unique circumstances as the applicant's immovable property, valued at R380 000, was declared executable by a district court to settle a debt of R13 914.93. Additionally, it was noted that there was no record of an application for declaring this property executable in the court file. Consequently, this court requested the legal representatives of both parties to provide further written submissions addressing whether an application for declaring the immovable property executable had been made in the Magistrates' Court and if such an application had been served on the applicant. Should there have been an application presented and considered by the Court, the parties were requested to provide a copy of such application. Moreover, based on the applicant's claim regarding rule 56A which was proposed by the Magistrates' Commission in 2017 having been promulgated, submissions were sought concerning its implications.

[8] Counsel for the first and second respondents responded to the court's inquiry, clarifying that rule 56A was merely a proposal from the Magistrates' Courts Committee and had not received approval; therefore, it does not constitute law. They argued that the Constitutional Court judgment of *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*[1] is not material to this matter since it pertains to the execution of residential immovable property governed by rule 43A of the Magistrates' Court Rules, while non-residential immovable property execution falls under rule 43. The first respondent indicated that an application seeking to declare immovable property executable in the Magistrates' Court was included with their answering affidavit marked "I".

[9] The applicant's legal representative responded to my inquiry, indicating that there was no request or application made in the Magistrates' Court to declare the immovable property executable, and the applicant was never served with such an application. The applicant argued that the sale of her property, valued at R380 000, to recover a debt of R13 914.93, particularly when the first respondent's attorneys were already receiving payments from the applicant regarding this debt was unlawful.

[10] I appreciate all parties for their responses to my inquiry. I agree with the

[1] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC).

respondents that the proposal by the Magistrates' Commission to introduce a new rule 56A was not approved and consequently not promulgated. Thus, the applicant's assertion that rule 56A was adopted and currently governs the execution of immovable property lacks merit. Instead, on 22 December 2017, rules 43 and 43A were amended to govern such executions in the Magistrates' Courts. Additionally, I agree with the respondents' counsel that rule 43[2] pertains to non-residential immovable property execution while rule 43A[3] addresses the execution of residential immovable property. However, I disagree with respondents' counsel regarding non-applicability of judicial oversight in the execution of non-residential immovable properties; judicial oversight remains applicable in cases involving these properties.

[11] Execution against immovable property in situations where a judgment debtor has failed to comply with a monetary judgment is governed by s 66(1)*(a)* of the Magistrates' Courts Act 32 of 1944 which states:

'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.'

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[2] Rule 43(1) of the Magistrates' Court Rules provide:

'(1)*(a)* Subject to the provisions of rule 43A, no warrant of execution against the immovable property of any judgment debtor shall be issued unless-

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the warrant; or

(ii) such immovable property has been declared to be specially executable by the court..

(b) A warrant of execution against immovable property shall contain-

(i) a full description of the nature, magisterial district and physical address of the immovable property to enable it to be traced and identified by the sheriff; and

(ii) sufficient information to enable the sheriff to give effect to subrule (3) hereof, including the title deed number, the erf number or sectional title unit number and exclusive use area to enable the Registrar of Deeds to identify the immovable property and record the attachment as an interdict against the immovable property.'

[3] Rule 43A provides:

'(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(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.'

[12] It is evident from the stipulations of s 66(1) that the Magistrates' Court can only declare immovable property executable upon demonstrating good cause. The court would have to evaluate an application to render the property executable, leading to a determination that good cause has been shown for such a declaration. While the first respondent argued that this application was submitted to the Magistrates' Court, it appears that such application is not contained in the court records. Although counsel for the first respondent claimed that the application was documented within pages 92 to 97 of the indexed materials, these pages actually contain the answering affidavit of the second respondent rather than any related documents. Moreover, item 36 in the applicant's index lists her heads of argument, with no item 37 present in these indexed documents.

[13] In paragraph 33 of its answering affidavit, the first respondent mentioned a copy of both the application to declare the immovable property executable and a sheriff's return of service as annexures "I" and "J". However, these annexures do not appear in the index; instead, annexure "F" pertains to a request for default judgment, annexure "G" relates to a warrant for execution against property, and annexure "H" addresses warrants of execution against immovable property found on page 91 of the indexed papers. Consequently, it cannot be said that there is a substantial basis for asserting that an application to declare the immovable property executable was made in the Magistrates' Court and attached to its records. The respondents have failed to provide or attach a copy of this application nor have they supplied evidence demonstrating service of this application upon the applicant, despite my request for such documentation.

[14] This brings me to the points in limine concerning the applicant's failure to either rescind or appeal the Magistrates' Court judgment. It is pertinent to note that following the sheriff's nulla bona return regarding the execution warrant issued for movable property, it became evident that the judgment debtor lacked sufficient movable assets to satisfy the warrant. This situation encompasses two separate processes: first, a monetary judgment is rendered against the judgment debtor; second, following the sheriff's nulla bona return regarding the execution of movables the creditor approaches the court for an order declaring immovable property executable. In this case, the applicant does not contest the monetary judgment

requiring her to pay levies owed to the first respondent. Instead, her grievance pertains to the order that declared her immovable property as executable. The monetary judgment mandating payment of debt and the order permitting execution of immovable property are indeed distinct matters. Consequently, the preliminary points concerning the applicant's failure to either rescind or appeal the judgment must fail, as she does not challenge that particular judgment.

[15] As for the third preliminary issue regarding the non-joinder of the sheriff, it should be noted that the Registrar of Deeds, who oversees the registering and transfer of the immovable property to the second respondent, was cited and served with the application. Although it is typically within the sheriff's purview to facilitate such transfers, it is important to clarify that the magistrate's order declaring immovable property executable attached as annexure "AM12" does not empower the sheriff to attend to the transfer of the immovable property to the second respondent. In this instance there is no explicit mention of the sheriff's duties concerning immovable property in the court order. In my view the non-joinder of the sheriff is not fatal to the applicant's case since both the first respondent and the Registrar of Deeds were cited in this proceedings.

[16] Concerning the argument made by the second respondent's counsel that the Magistrates' Court possesses jurisdiction to declare immovable property executable regardless of its monetary value, counsel failed to provide any supporting authorities to substantiate this position. In my opinion, without a mutual agreement between the parties involved and considering that the jurisdiction of the Magistrates' Court is governed by statutory regulations, it will exceed the powers of the magistrate to declare an immovable property executable if its value significantly exceeds its own monetary jurisdiction.

[17] The current case illustrates significant challenges in delivering justice in this court, stemming from what seems to be a blatant disregard for justice in the Magistrates' Court. Firstly, one must consider whether a court exercising judicial authority would have considered an immovable property valued at R380 000 executable for settling an original debt of R13 914.93 when the applicant had proposed to pay off this debt in monthly instalments of R5 000. This question should be addressed by the court considering the application for declaring the immovable

property executable based on presented facts. However, due to the absence of a record accompanying that application, I refrain from commenting on this matter.

[18] Secondly, there remains uncertainty regarding whether the district court had jurisdiction to declare an immovable property executable when its value far exceeds its monetary limits. Without access to the reason by the magistrate who declared the immovable property executable I cannot determine what factors may have influenced that court's decision to exercise such jurisdiction. Lastly, it is evident that there was no formal application before the Magistrates' Court and that judicial oversight was not exercised when declaring the immovable property executable.

[19] The other challenge pertains to how this case came before this court. Rule 51 of the Magistrates' Courts Rules governs appeals from the magistrates' court to the high court. According to this procedure, the appellant would have needed to request that the magistrate provide written reasons to the Clerk of the Port Shepstone Magistrates' Court concerning the order declaring the immovable property executable; which reasons would then become part of the official record. It is required that this documentation outlines both the facts established by the magistrate and his/her reasoning for issuing the order. Following this, the appellant would file an appeal with this Division of the high court against the magistrate's order, specifying both legal and factual grounds for the appeal.

[20] In relation to the applicant's decision not to appeal the magistrate's order but instead seek relief from this court, counsel for the applicant argued that it is imperative for this court to exercise its inherent jurisdiction and grant relief in favour of the applicant, despite non-compliance with procedural rules when approaching this court. I find difficulty in accepting that argument. Firstly, inherent jurisdiction refers to the authority of the high court to adjudicate any matter presented before it unless restricted by statute or rule or if exclusive jurisdiction is assigned to another tribunal.[4] The inherent power of the high court encompasses not only ensuring effectiveness in its orders or regulating its own procedures but also administering justice where no specific law directly addresses a particular scenario.[5] In this instance, there is no absence of a legal framework regarding appeals from a magistrates' court to a high

[4] *M v M* [2017] ZAGPJHC 279 para 13.
[5] *Ex Parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at 585H.

court. Secondly, it is not advisable for this court to adjudicate on substantive issues without having considered insights from the magistrate who initially dealt with this case.

[21] To provide the requested relief, the magistrate would have needed the chance to present his/her rationale, allowing this court to thereby assess the merits of the proceedings from the magistrates' court. Additionally, this court is unable to suspend the execution warrant since it has already been executed and the immovable property has been sold to the second respondent. The court cannot issue a final interdict preventing the transfer of property to the second respondent while an order exists declaring that property executable; though there is no record of the application to declare the immovable property executable in the Magistrates' Court. Even if the applicant were to appeal the order declaring her property executable, this court would have to rely on the record of the Magistrates' Court to determine the appeal.

[22] The record clearly indicates that the applicant is an indigent debtor, as it was undisputed that she fell behind on her monthly payments following her job loss. Since there appears to be irregularities in the Magistrates' Court process, a critical issue is whether, as custodians of justice, this court should overlook these noticeable irregularities that led to the loss of the applicant's immovable property, an action that could effectively hinder her access to judicial recourse. The magistrate who issued the declaration order is in the best position to clarify these issues, more particularly whether there was an application considered in open court for declaration of the immovable property executable. In my view, a fair outcome that balances justice would involve granting an interim interdict against transferring ownership of the property for three months. This timeframe would allow the applicant to determine her next steps in seeking redress at the Magistrates' Court and any option available to her in bringing this matter to this court.

[23] Regarding costs, considering the glaring irregularities in the Magistrates' Court combined with the failure on part of the applicant to follow proper procedures when bringing this matter before this court, each party should bear its own costs.

Order

[24] In the premises, the following order is made:

1. The applicant's application to set aside the sale of the immovable property situated at ERF 1[...] Shelly Beach is dismissed.
2. The applicant's application succeeds to the extent that the first and third respondents are interdicted from transferring the immovable property located at ERF 1[...] Shelly Beach to the second respondent for a duration of three months. This will allow the applicant to follow the correct procedure concerning the order declaring the property executable by the Port Shepstone Magistrates' Court.
3. There is no order regarding costs.

MATHENJWA J

Appearances

Applicant's counsel:	Mr T Kadungure
Instructed by:	Balfour Myesi Attorneys
	Mthatha
First respondent's counsel:	Mr M Sewpal
Instructed by:	Sharlene Govender and Associates
	Port Shepstone
Second respondent's counsel:	Mr M G Chetty
Instructed by:	Deshan Naidoo Attorneys
	Port Shepstone
Date of hearing:	12 February 2026
Date of judgment:	15 April 2026