

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

CASE NUMBER: 38015/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 01/3/2023

In the matter between:

NEDBANK LIMITED

And

SELLO SHADRACK MALAKA

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

[1] The issue in this matter is whether the respondent's immovable property should be declared especially executable and, if so, what the reserve price for the property should be. In this regard the applicant seeks an order in terms of rule 46A of the Uniform Rules of Court.

[2] The property that is the subject of the application is Section 125 on Sectional Plan no SS189/2015 in the scheme known as St Aidan ERF [....] B[....] D[....] E[....] [....] ("the Property").

[3] The claim for the property's execution arises from the respondent's failure to service a mortgage loan agreement concluded between the applicant and the respondent during 2015.

[4] The applicant is a public company duly registered and incorporated by the company laws of the Republic of South Africa and is also registered as a bank in terms of the Banks Act, 94 of 1990. It is also registered as a credit provider in accordance with the National Credit Act, 34 of 2005 ("the NCA").

[5] The respondent, Mr Sello Shadrack Malaka, is an adult male, appearing in person.

[6] It is common cause that on 10 February 2015, the applicant and respondent entered into a home loan agreement in terms of which the applicant lent and advanced an amount of R 1 075 500.00 to the respondent in order to allow him to acquire the property.

[7] The respondent's indebtedness to the applicant was secured by the registration of a mortgage bond over the property.

[8] The respondent failed to make payment of the full monthly instalments due under the loan agreement and consequently was in breach thereof. He was required to remedy his breach by making payment of all the arrears and overdue amounts, failing which the applicant would enforce its rights in terms of the agreement and

recover the full balance outstanding under the loan agreement together with interest and costs.

[9] On 26 July 2017 the parties entered into a further agreement, namely a “Distressed Restructure Agreement” changing the terms and conditions of the prior mortgage loan agreement in that the monthly instalment to be R9 929.49 paid over a period of 360 months.

[10] During 2021 the respondent applied to be placed under Debt Review in terms of the NCA which Debt Review process was terminated by the applicant on 21 July 2021.¹

[11] The last payment by the respondent on the loan account was made on 7 October 2020 in the amount of R8 200.00.

[12] Summons was issued on 10 August 2021. On 23 August 2021 the summons was personally served on the respondent.

[13] As at the date of the summons, the bond account was 16.94 months in arrears. The amount in arrears accumulated to R141 764.46. The full balance outstanding on the account was R1 333 759.95.

[14] The property is the primary residence of the respondent.

[15] The status of the bond account as on 3 February 2023 was as follows:

15.1. Arrears: R 360 538.35

15.2. Balance: R1 560 768.16

¹ Notice in terms of Section 86 (10) of the NCA was delivered to the respondent and the respondent’s Debt Counsellor by registered post. The notices have been delivered to the post office responsible for the delivering of post to the respondent and the Debt Counsellor’s address. Notice was also given to the National Credit Regulator by email.

15.3. Instalment payable: R11 684.23

15.4. Months in arrears: 30.86

[16] It is undoubtedly so, that foreclosure of immovable property, which is the primary residence of a consumer has a major impact on the rights contained in section 26 (1) of the Constitution: the right to have access to adequate housing.

[17] However, in *Absa Bank Ltd v Petersen*² it was held that where an order of execution is sought against a judgment debtor's home that is mortgaged to a bank, the proper approach is to give effect to the mortgage bond unless something makes it inappropriate to do so, having regard to all the relevant circumstances of the case.

[18] In *Gundwana v Steko Development and Others*³ the Constitutional Court held:

“[W]here execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought, after judgment on a money debt, further judicial oversight by a court of law, of the execution process, is a must.”

[19] Rule 46(A) deals with the procedural rules for executing a judgment debt against residential immovable property. The rule focuses on two main aspects: determining if it is justified to sell the debtor's home in execution and, if a sale is ordered, setting a reserve price at which the property is to be auctioned.

[20] In *Firststrand Bank v Folscher*⁴ the court listed an extensive range of factors that could be considered when deciding whether a writ should be issued. Nevertheless, the court was careful to note, at paragraph [41], that not each and every factor had to be taken into account for every matter; rather, the enquiry had to be fact-bound to identify the criteria that was relevant to the case in question.

² 2013 (1) SA 481 (WCC) on page 494 to 496.

³ 2011 (3) SA 608 (CC) at para [41].

⁴ 2011 (4) SA 314 (GNP).

[21] The right to have adequate housing is enshrined in section 26 of the Constitution. The authorities have accepted that the underlying purpose of rule 46A is to impose a procedural rule to give effect to the right to adequate housing as envisaged by the Constitution.⁵ It is now well established that the execution of immovable property by a judgment creditor has to be done with the court's oversight.

[22] It is common cause in the present matter that the property is the respondent's primary residence. He was alerted to his rights in terms of section 26(1) of the Constitution in the notice of motion. Except for the inconvenience of his wife and children residing at the property, there is no evidence suggesting that he would not be able to afford alternative accommodation. He is currently employed at a mine in the Northern Cape and earn an income of approximately R 80 000.00 per month. He should on this basis be able to secure alternative accommodation.

[23] Since October 2020, a period of more than two years has elapsed, during which the respondent has failed to bring the arrears up to date or to make any acceptable arrangement with the applicant to address his breach of the underlining home loan agreement.

[24] Furthermore, the outstanding amounts regarding rates and taxes, as well as the outstanding amount owed to the Home Owners Association are of a great concern. The arrears on these accounts amounts to R56 529.62 and R 156 915.15 respectively.

[25] It is clear that much was done by the applicant to assist the respondent with the payment of the arrears before summons was issued against him. In fact, the parties entered into a "Distressed Restructure Agreement" which was concluded during 2020 in order to accommodate the respondent in retaining the property. It is clear that the respondent was unable to adhere to the terms of the restructured agreement.

⁵ See *Petrus Johannes Bestbier and Others v Nedbank Limited* (Case No. 150/2021) [2022] ZASCA 88 (13 June 2022).

[26] It is evident that the amount in arrears has doubled since summons was issued. Furthermore, interest on the outstanding balance is accumulating and therefore it is in the best interest of the respondent as well as the applicant that the application be granted, as there is still equity in the property.

[27] Regarding the question of executability of the property it is important to note the following remark by the Constitutional Court in *Gundwana v Steko Development CC and Others supra*;

“It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”⁶

[28] Having considered the matter and all factors that were placed before me, I am of the view that the application in terms of rule 46A should be granted in favour of the applicant and that to ameliorate the hardship that the respondent may endure, that a reserve price be set.

[29] The respondent made no submission regarding the reserve price and therefore I rely on the values pertaining to the property provided by the applicant. It is also important to bear in mind that a reserve price must be realistic: it cannot be so high that the auction is likely to fail to attract a buyer. That would serve the interests of neither party. In particular, the respondent, as judgment debtor, ultimately would be burdened with the increased costs associated with a failed execution process.⁷

[30] In setting the reserve price I have regard to the market value of the property, which according to the applicant is R 1 200 000.00. The municipal value of the

⁶ *Ibid* at para [54]

⁷ *Standard Bank of South Africa Limited v Lamont* (17022/2018) [2022] ZAGPJHC 3; 2022 (3) SA 537 (GJ) (25 January 2022 at para [40].

property which is R 1 228 000.00. The amount owing as rates and taxes which is about R56 529.62 and the amount outstanding in relation to the Home Owners Association which is R 156 915.15. As a result, I determine the reserve price of the property at R 700 000.

[31] In the circumstances, I find that the applicant has made out a case for the property to be declared executable.

[32] I accordingly make the following order:

1. The respondent shall pay the applicant the sum of R 1 333 759.95 (ONE MILLION THREE HUNDRED AND THIRTY-THREE THOUSAND SEVEN HUNDRED AND FIFTY-NINE RAND AND NINETY-FIVE CENTS).
2. Interest on the above amount at the rate of 7.05% (SEVEN POINT ZERO FIVE) percent per annum calculated and capitalised monthly in advance in terms of the mortgage bond, from the 01/07/2021 to date of payment.
3. An order declaring the respondent's immovable property:

SECTION NO. 125 as shown and more fully described on Sectional Plan No. SS189/2015 in the scheme known as ST AIDAN in respect of the building or buildings situate at ERF [...] B[...] D[...] E[...] [...], LOCAL AUTHORITY: CITY OF JOHANNESBURG, of which section the floor area, according to the said sectional plan, is 116 (ONE HUNDRED AND SIXTEEN) square metres in extent; and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said Sectional Plan.

HELD under Deed of Transfer No. [...] (Situated at UNIT [...] ST AIDAN, 3 TWAIN STREET, BARBEQUE DOWNS EXT 46) mortgaged under Mortgage Bond No [...] ("the Property"), to be specially executable for the sum of R1 333 759.95 plus interest thereon at the rate of 7.05% per annum from

01/07/2021 to date of payment plus costs on the scale as between attorney and client;

4. The Registrar of this Court is authorised to issue a warrant of attachment herein;

5. The Sheriff of this Court is authorised to execute the warrant of attachment herein;

6. The respondent may in terms of the provisions of section 129(3)(a) of the National Credit Act 34 of 2004 at any time before the applicant has cancelled the agreement re-instate the agreement by paying the amounts referred to in paragraph 9 below and the respondent may not re-instate the agreement in terms of section 129(4) after the sale of any property.

7. The respondent may prevent the sale of the property referred to in paragraph 3 above if he pays to the applicant all of the arrear amounts owing to the applicant, together with the applicant's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement, prior to the property being sold in execution.

8. The arrear amounts, enforcement costs and default charges referred to in paragraph 6 above may be obtained from the applicant.

9. The respondent is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the respondent to the applicant, without reference to the accelerated amount.

10. A copy of this order is to be served personally on the respondent, as soon as is practical after the order is granted, but prior to any sale in execution

11. A reserve price of R700 000.00 is set.

12. In the event that the reserve price is not met for the property at the auction sale, then the Sheriff of this Court is hereby authorized to submit a report to this Court within 5 (five) days of the auction for an order that the property be sold to the person who made the highest offer or bid as provided.

13. Costs on the scale as between attorney and client.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 1 March 2023.

DATE OF HEARING: 27 February 2023

DATE JUDGMENT DELIVERED: 1 March 2023

APPEARANCES:

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The Respondent:

In Person