

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Ahmanto and Another (29 December 2016) (38858/09) [2016] ZAGPJHC 355 (29 December 2016) [2016] ZAGPJHC 355

COURT

South Gauteng High Court, Johannesburg

BEFORE

Klaaren

CASE / FILE NUMBER

38858/09

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA,

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: 38858/09

Not

reportable

Not

of interest to other judges

Revised.

In the

matter between: ABSA
 BANK
 LIMITED Applicant
 and
 AHMANTO
 HAMID First
 Respondent
 THE
 SHERIFF OF THE HIGH COURT –
 LENASIA Second
 Respondent

JUDGMENT

KLAAREN, AJ:

INTRODUCTION

- [1] This is an application by ABSA Bank to declare certain immovable property (Erf [...]8 Lenasia) owned by the respondent Hamid Ahmanto specifically executable and to authorize the Registrar of the Court to issue a writ of execution against such property. The application is based upon a default judgment granted by this court on 6 January 2010, in terms of which Ahmanto is liable to pay the amounts of R1 118 604.34, R527 647.33, and R1 303 130.75 plus interest and costs. The total
- without interest and costs is R2 949 382.42.
- [2] The hearing before me raised several issues: whether ABSA has properly made out its case on its founding papers, whether the immovable property was the primary residence of Ahmanto, and whether ABSA has complied with the proviso to Rule 46(1)(a)(ii). If the property is the primary residence of Ahmanto, the proviso to Rule 46(1)(a)(ii) is triggered in an application such as this where a writ of execution is sought against the immovable property of a judgment debtor.
- [3] In the view I take of the matter, aside from the issue of whether the immovable property is Ahmanto's primary residence, ABSA Bank has made its case to declare the property specially executable. Further, I find that, if the property is Ahmanto's primary residence, then ABSA Bank has not fully complied with the proviso of Rule 46(1)(a)(ii) and is not entitled to an order authorizing the Registrar to issue a writ of execution. Further, since the papers before me reveal a dispute of fact whether the immovable property is Ahmanto's primary residence and the resolution of this matter turns on that narrow issue, I will refer that issue to oral evidence.

LITIGATION HISTROY

[4] ZAHA Investments CC (ZAHA) was a close corporation with members Hamid Ahmanto and Zheer Ahmanto in the business of manufacturing coffins. In 2007 and early 2008, ZAHA entered into a series of loan agreements with ABSA Bank, giving security to ABSA over ZAHA's immovable properties. Hamid Ahmanto signed a surety agreement on behalf of ZAHA in favour of ABSA. A further security in favour of ABSA was given through a mortgage bond dated 21 February 2008 and registered over Erf [...]8 which is owned by Hamid Ahmanto.

[5] ABSA advanced the monies to ZAHA, but ZAHA did not fulfil its obligations and went into a liquidation process. ABSA acted

upon Ahmanto's suretyship agreement. On 6 January 2010, the court granted a default judgment in case number 38858/2009

against Ahmanto for three claims totalling R2 949 382.42 based on this suretyship. On 1 June 2010, ZAHA was liquidated and the liquidators later made some payments to ABSA.

[6] On the basis of the 6 January 2010 default judgment, ABSA later caused a writ of execution for movable assets to be issued against Ahmanto. On 22 October 2014 at 16:00, the sheriff attempted to serve a writ of attachment for movable property on Ahmanto at Erf [...]8. The property was unattended. On 23 October 2014 at 8:17, the sheriff attempted the same and met with the same result. The return of service for this date notes "NB: relocated to the Vaal." The sheriff was provided with Ahmanto's cellphone number and arranged to meet him at the property. On 30 October 2014 at 7:46, the sheriff served the writ of attachment personally on Ahmanto. Ahmanto then stated to the sheriff that it was impossible to pay the amount claimed or any sum. The sheriff issued a nulla bona return of service in respect of the writ of attachment for movable property.

[7] ABSA commenced the current application with a founding affidavit and notice of motion in March 2015. On 14 April 2015 at 16:35, the sheriff attempted to serve the process and failed because the property was locked. On 15 April 2015 at 11:05, the sheriff attempted the same and met with the same result. The sheriff arranged to meet Ahmanto and on 16 April 2015 at 15:30, the process was served on Ahmanto at Erf [...]8.

[8] On 23 June 2015, Ahmanto filed a notice of intention to oppose in forma pauperis in terms of Rule 40. He then filed an answering affidavit on 26 June 2015. ABSA on 26 November 2015 filed an application for leave to condone the late filing of ABSA Bank's replying affidavit, dated 23 October 2015. As noted below, the delay was because of investigations made by ABSA regarding the issue of Ahmanto's primary residence.

HAS ABSA ADEQUATELY SET OUT ITS ENTITLEMENT TO THE DECLARATION OF THE PROPERTY AS SPECIALLY ?

- [9] ABSA's first hurdle in this case relates to the state of its founding papers. Ahmanto argues that ABSA failed to make clear what amount is in fact due and owing. This is so, it was argued, because the founding affidavit only explicitly mentions one of the amounts made to ZAHA's accounts with ABSA by the liquidators yet three payments were made. The founding affidavit acknowledges R850 000 as paid to account 7010043978 on or about 9 December 2014. This was the proceeds from the sale of one of ZAHA's properties.
- [10] It is common cause, however, that further payments were made. Ahmanto notes that ABSA admits in its replying affidavit that payments of R1 000 000 and R 190 000 were received on various dates after the liquidation of ZAHA and before the launch of this application. On Ahmanto's argument, these admissions do not detract from ABSA's failure to specify as part of its founding papers the proper amount due and owing and thus to allege the case that Ahmanto was to meet. To the extent that ABSA depends upon the certificates of balance attached as appendices to the founding affidavit to provide the specification of the amount, Ahmanto disputes their power to function as prima facie proof of the amount.
- [11] ABSA argues that its founding papers are sufficient. ABSA points first to three certificates of balances attached as part of the founding papers and to the agreement of the parties (expressed in the loan agreements and the mortgage bonds) that such certificates could function as prima facie proof. The certificate of balance for account number [...]02 for 10 February 2015 was R581 406.62. The certificate of balance for account number [...]78 on 10 February 2015 was R 1 625 699.71. The certificate of balance for account number [...]36 on 10 February 2015 was R809 748.35. The total was thus R3 016 854.68.
- [12] Counsel for ABSA further demonstrated that the payments beyond the R850 000 had also been taken into account by noting that the certificate of balance for account number [...]02 (which was not the ZAHA account into which the R850 000 was allocated) for 1 January 2010 for the purpose of the default judgment had been R1 086 143.55, higher than the certificate of balance for this account at 10 February 2015 (see above).
- [13] Precedent approving the power of a certificate of balance to function as prima facie evidence is contained in *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A). At 381, the Senekal court stated: "It appears to me, however, that the purpose of adding the words at the end of the certificate clause was to extend rather than to limit the scope of applicability of the fundamental provision that such a certificate was to constitute prima facie evidence of the amount of the debt owed to the bank by the principal debtor. Whenever a bank claims payment of money said to be owing to it by a customer who enjoys overdraft facilities on a current account which fluctuates, possibly from day to day, it must needs rely on its books of account and other records of transactions in order to establish the amount due to it. To prove every one of the many entries in the books, which may have been made from time to time by a large number of different employees, might for obvious reasons sometimes be extremely difficult."

- [14] At 382E, the Senekal court further stated: “We are not now concerned, however, with the questions whether the certificate itself, read with the deed of suretyship, would have rendered the claim sufficiently liquid to entitle the respondent to provisional sentence, but with the question whether such a certificate can have value in the sense of constituting prima facie evidence of the amount of the indebtedness in proceedings such as were instituted by respondent, and to that question the answer appears to me, on construction of the agreement, to be “Yes”.” In line with Senekal, ABSA argued that the presence of evidence rebutting the accuracy of the certificates does not destroy their admissibility but rather diminishes the sufficiency of the proof afforded to the certificate.
- [15] As noted above, the power of the certificates of balance to function as prima facie evidence is a matter of construction of the agreement. Counsel for Ahmanto argued that Senekal should be distinguished from the case at hand. In Senekal, the use of certificates was prior to a judgment, whereas the use here would be after a judgment. There is however nothing in the loan agreements or the mortgage bonds to suggest that the certificates of balance are not prima facie proof after judgment. For instance, clause 29 of the loan agreement applicable to account number [...]36 provides: “A certificate signed by a manager of the Bank specifying the interest rate(s) applicable to the Loan and/or the amount owing by the Borrower to the Bank and further stating that such amount is due, owing and payable by the Borrower to the Bank, shall be prima facie proof of such applicable interest rate(s) and/or the amount of such indebtedness and of the fact that such amount is due, owing and payable, for the purpose of obtaining provisional sentence or other judgement in any competent court, as well as execution under the Mortgage Bond and it shall not be necessary to prove the appointment of the person signing any such certificate.” Likewise, clause 9 of the mortgage bond issued over Erf [...]8 provides: “Proof of indebtedness: 9.1 The amounts at any time owing by the Mortgagor to the Bank which are secured under this bond (including any interest and the rate or rates at which and the period or periods for which interest is calculable) and the fact that such indebtedness is due and payable may be determined and proved by a certificate signed by any manager of the Bank, whose appointment and authority to sign such certificate need not be proved. 9.2 Such certificate shall be accepted as proof of the facts stated therein, unless the Mortgagor is able to prove the facts incorrect.”
- [16] On the basis of the certificates of balance provided, ABSA did make out an adequate and sufficient case in its founding papers for the declaration of the property as specially executable.
- [17] Assuming that Erf [...]8 is Ahmanto’s primary residence, has ABSA adequately canvassed and brought before court Ahmanto’s
- legally relevant circumstances?
- [18] In my reading of the papers, it is ABSA’s case that it wishes to prove that the immovable property is not the primary residence of Ahmanto, not that it might be his primary residence. In its application, ABSA stated in para 11.1 of its founding affidavit that it did not

know whether the property was the primary residence or not. That paragraph reads: “It is unknown to the applicant whether the property constitutes the first respondent’s primary residence as envisaged by the provisions of Rule 46(1) of the Rules of the above Honourable Court. The Sheriff of the High Court Lenasia did however note[] in the return of service annexed as Annexure “AB15” that the first respondent relocated to the Vaal. It does therefore appear that the first respondent no longer resides at the premises.”

[19] Further, ABSA averred in para 11.5: “In the event of the first respondent alleging that the property is his primary residence, he is hereby notified of his rights in terms of Section 26(1) of the Constitution of the Republic of South Africa which provides that everyone has the right to have access to adequate housing and he is hereby advised that it is incumbent upon them to place information before the above Honourable Court in order to specify any reason why his rights to adequate housing would be infringed, should the above Honourable Court grant an order in terms of the Notice of Motion.”

[20] Where the immovable property against which a writ of execution is sought is the primary residence of the judgment debtor, special

protections are provided and special practices must be followed in terms of Rule 46(1)(a)(ii). As this court has noted in *Jordaan & Wolberg Attorneys v Morgan*, “[t]he effect of the proviso is that only a court is competent to declare any or all of a judgment debtor’s residential

immovable property specially executable under the provisions of Rule 46(1)(a)(ii). If such residential property consists of the judgment debtor’s primary residence, the court has, in terms of the proviso to Rule 46(1)(a)(ii), to consider all relevant circumstances before ordering execution against such property. In deciding whether or not to declare the primary residence of a judgment debtor who is a natural person specially executable, the court must consider all relevant circumstances as contemplated in the sub-rule. This means ‘legally relevant circumstances.’”[1] In that case, Adams AJ set out the general analysis to be used in a matter involving a primary residence and applied that analysis to the circumstances there.[2]

[21] These special protections and practices have been mandated and elaborated in the Constitutional Court judgments of *Jahta v Schoeman & Others*[3] and *Gundwana v Steko Development CC*, where for instance lower courts have been cautioned that “in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially

considered before granting execution orders.”[4]

[22] In the practice of this court, these special practices are encapsulated in Chapter 10.17 of the *Gauteng, Johannesburg Practice*

Manual (Erasmus Superior Court Practice, January 2010, RS 1, 2015, H3-100F) “Foreclosure (and Execution When Property Is, or Appears to Be, the Defendant’s Primary Home”. ABSA has not filed an affidavit as called for in Chapter 10.17 of the Practice Manual.

[23] While counsel for ABSA argued that even if Erf [...]8 is Ahmanto’s primary residence that the legally relevant circumstances have been set out in the papers and the writ should issue, ABSA’s primary case was that this property is not Ahmanto’s primary residence and such relevant circumstances need not be fully considered. The information that ABSA did set out regarding Ahmanto’s circumstances was relatively scant. ABSA noted that the property was not acquired by means of or with the assistance of a state subsidy and that ABSA believes Ahmanto is still employed and can afford alternative accommodation. This information does not measure up to the legally relevant circumstances as required by the proviso to Rule 46(1)(a)(ii).

IS ERF [...]8 THE PRIMARY RESIDENCE OF AHMANTO?

[24] As noted above, ABSA’s founding affidavit avers on the basis of the returns of service that the property is not Ahmanto’s

primary residence. Ahmanto answered in his affidavit, stating in para 32: “The Property constitutes a primary residence of myself, my partner, Riana (aged 55) my divorced daughter, Sabjee Fahiza (aged 35 years) and her two minor children, Lutfiya (aged 13 years) and Mohamed (aged 8 years).” Ahmanto also stated in para 34: “Given my inability to earn an income, the Property was partitioned and I took in a tenant who conducts a spaza shop from the other portion of the Property and pays rent which, in turn, I pay to maintain my bond obligations in favour of the Applicant under bond account no. B010716/08.” There is some ambiguity in Ahmanto’s averment. He states that the property is “a” primary residence of himself and the four others, not “the” primary residence of these persons.

[25] ABSA’s replying affidavit denied that the property was Ahmanto’s primary residence. ABSA noted that the averment

was unsupported by documentary evidence and was not confirmed by any of the persons alleged to be occupying with him.

[26] Further, ABSA has brought forward evidence (beyond the return of services) that it argues demonstrates that the property is not Ahmanto’s primary residence. After receipt of Ahmanto’s answering affidavit, ABSA appointed a specialized firm, Precision Tracers and Debt Collector (Precision Tracers), to investigate whether the property was the primary residence of Ahmanto. Precision Tracers conducted on-site investigations through observation of the property over several days. ABSA relied upon this report dated 30 September 2015 in its replying affidavit and attached the report there. One of the findings of the report (which was two pages of text and several pages of documents) was that “Mr Ahamanto [sic] is not residing at 76 Shaba Road, but locals confirm they know him and he is often seen at the shop.” Precision Tracers also reported to ABSA that Ahmanto “might be

residing” at a property in Ennerdale, “him being the owner of this property, as per Windeed enquiry conducted after we received this information from the locals.” Ahmanto has of course not had an opportunity to probe this evidence.

- [27] As regards the definition of primary residence in these circumstances binding in this matter, the court in *FirstRand Bank v Folscher* pertinently stated: “The judicial oversight that must be exercised is therefore limited to those instances where the execution order relates to the debtor's principal or -usually - the only dwelling the judgment debtor owns. Execution against a holiday home or a second house that is not usually occupied by the debtor does not trigger the application of the Rule.”[5]
- [28] The usual rule in motion proceedings where there is a dispute as to the facts is that a final order should only be granted if the facts stated by the respondent, together with the admitted facts in the applicant’s affidavit, justify the order. This is the case at least where the allegations or denials put forward by the respondent are not bare or unsubstantiated.
- [29] There is certainly not much detail nor supporting evidence along the lines that one would expect to find with respect to a property that was one’s primary residence – in the sense of a house that is usually occupied by the debtor (and, it is alleged, four other members of his family). Still, it is hard to term the allegation that this is Ahmanto’s primary residence as bare or far-fetched. He has alleged it is such, not only for himself but for four other members of his family. He is evidently known in the area. He has made arrangements to accept service at this premise on several occasions. In his answering affidavit, he averred that the property was partitioned in order to meet expenses, after being purely residential.
- [30] After the hearing in this matter was concluded, I invited the parties to make further brief submissions on the assumption that the affidavits filed reveal a dispute of fact on the issue whether or not Erf [...]8 is the primary residence of Mr Ahmanto. The parties were to indicate and address whether an order in terms of Rule 6(5)(e) (another round of affidavits) or Rule 6(5)(g) (referral of the issue to oral evidence). Submissions were received from both parties.
- [31] I agree with the argument made by ABSA that the filing of a further affidavit or round of affidavits is not appropriate at this stage in this case. It is further common cause that the referral to oral evidence falls within the discretion of this court.
- [32] In my estimation, the situation is one where the preponderance of probabilities favours the applicant, ABSA. In terms of *Kali v Decotex*, it is thus one that favours referring the issue to oral evidence.
- [33] On this issue, I have come to the conclusion that the papers establish a dispute of fact on the issue whether or not the property

at issue is the primary residence of Ahmanto. The issue of whether the immovable property is or is not the primary residence of Ahmanto is the sole and the dispositive issue remaining. In my view this is a sufficiently narrow albeit critical issue that it may be referred to oral evidence in terms of Rule 6(5)(g).

[34] If the immovable property is Ahmanto's primary residence, then the application should be dismissed, because ABSA has not canvassed the legally relevant circumstances for such a situation in terms of the proviso to Rule 46(1)(a)(ii). If the immovable property is not Ahmanto's primary residence, then the application should be granted and the property declared specially executable and the Registrar authorized to issue a writ in execution.

[35] Accordingly I make the following order –

1. That the affidavits filed to date reveal a dispute of fact on the question whether or not Erf [...]8 ("the immovable property") is the primary residence of the first respondent.
2. That the application in regard to the immovable property is referred for the hearing of oral evidence at a time to be arranged with the Registrar, on the question as to whether the immovable property of the first respondent is the first respondent's primary residence or not.
3. The evidence shall be that of any witnesses whom the parties or any of them may elect to call, subject, however to paragraph 4.
4. Save in the case of witnesses who have already deposed to affidavits, no party shall be entitled to call any witness unless:
 - a. It has served on the other parties at least 15 days before the date appointed for the hearing a statement wherein the evidence to be given in chief by such person is set out; or
 - b. The Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.
5. Any party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.
6. The fact that a party has served a statement in terms of paragraph 4 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
7. Within 30 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in paragraph 2 hereof, which are or have at any time been in the possession or under the control of such party.
8. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court ("the Rules") and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

9. The provisions of Rule 37 shall be operative in respect of the hearing of oral evidence as if it were a trial.
10. The incidence of the costs incurred to date in respect of the application against the first respondent, save for costs orders already granted in favour of any party, shall be reserved for determination after the hearing of oral evidence.

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J KLAAREN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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DATE OF HEARING

DATE OF

JUDGMENT

29 DECEMBER 2016

[1] Jordaan & Wolberg Attorneys v Morgan (2013/1814) [2015] ZAGPJHC 272 (11 November 2015), 21–23, accessed October 15, 2016.

[2] Ibid., paras. 20–27.

[3] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (CCT74/03)

[2004] ZACC 25; 2005 (2) SA 140 (CC)[2004] ZACC 25; ; 2005 (1) BCLR 78 (CC) (8 October 2004), accessed October 15, 2016.

- [4] Gundwana v Steko Development CC and Others (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011), 53, accessed November 21, 2016.
- [5] FirstRand Bank v Folscher 2011 (4) SA 314 (GNP); [2011] ZAGPPHC 79 (24 May 2011), 30, accessed October 19, 2016.
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