

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Shaw and Another (38990/2021) [2022] ZAGPJHC 427 (28 June 2022) [2022] ZAGPJHC 427

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

38990/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

CASE

NO: 38990/2021

REPORTABLE:

Not

OF

INTEREST TO OTHER JUDGES: Not
REVISED.

28

June 2022

In

the matter between:

ABSA
BANK LIMITED
Applicant
and
DOUGLAS
J SHAW
First Respondent
THE
TRUSTEE FOR THE TIME BEING OF THE SOUTH
AFRICAN
HOME LOANS GUARANTEE TRUST
Second Respondent

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 28 June 2022.

Summary:

Application to execute an immovable residential property in terms of Rule 46 (1) read with Rule 46A of the Rules. The respondent, a Legal Practitioner- Advocate failed to comply with various court orders granted against him de bonis propriis. The property declared executable. The respondent found not to be an indigent and being able to rent an alternative accommodation.

JUDGMENT

MOLAHLEHI J

- [1] The issue in this matter is whether the first respondent's immovable property should be declared executable and, if so, what the reserve price for the property should be. In this regard the applicant seeks the order in terms of rule 46(1)(a)
- (i) read with rule 46A(8)(e) of the Uniform Rules of Court (the Rules).
- [2] The property that is the subject of this application is Unit Section 4 on Sectional Plan no [...], in the scheme known as 17 ON Forest, situated at Lone Hill Extension [...] Township, City of Johannesburg. The property is held under deed of transfer number [...] (the property).
- [3] 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).
- [4] The first respondent, Adv Douglas J Shaw, is a Legal Practitioner of the High Court of South Africa.

- [5] The second respondent, The Trustee, For the Being of the South African Home Loans Guarantee (the Trust), cited as an interested party in these proceedings, is the mortgagee of the immovable property that is sought to be declared executable. There is no relief sought against the Trust.
- [6] The claim for the property's execution arises from the first respondent's failure to satisfy the various court orders that had been granted *de bonis propriis* against him. The orders were made in several matters where he represented clients as Counsel.
- [7] The background facts, which are largely common cause is that the first respondent appeared as Counsel in four matters in the high court, three of them before the court in this Division and one in the Western Cape Division. The following matters served before this court:
- (a) T.C Hayiock v Absa Bank Limited in the Johannesburg High Court under case number: 24820/2015 ("Haylock matter");
 - (b) L. Mouton v Absa Bank Limited in the Johannesburg High Court under case number: 17922/2014 ("Mouton matter").
 - (c) P.A Simon v Absa Bank Limited in the Johannesburg High Court under case number: 35657/2016 ("Simon matter");
 - (d) The cases of Absa Bank Limited v R.S Doran served before the Cape Town High Court under case number: 23991/2016 ("Doran matter").
- [8] The matters of Haylock and Mouton were heard on the same date by Keightley J, who handed down a joint judgment on 14 July 2017. In that judgment, the Learned Judge dismissed the first respondent's rescission application and directed that the first respondent show cause why he should not personally pay the costs.
- [9] The outcome of the hearing on the issue of costs was that the first respondent was ordered to pay the costs personally on the an attorney and client scale. Aggrieved by this outcome, the first respondent sought leave to appeal. The leave to appeal application was dismissed on 23 October 2018.
- [10] The first respondent was again aggrieved by the outcome of the leave to appeal and accordingly approached the Constitutional on appeal in May 2020 in an attempt to challenge the constitutionality of the costs *de bonis proprii* but was unsuccessful.
- [11] In the Simon matter, the applicant opposed the rescission application instituted on behalf of the client by the first respondent. The applicant indicated in the answering affidavit that it would seek an order for costs against the first respondent personally when the matter was to be heard. The applicant obtained the costs order by default; the first respondent having failed to appear on the day of the hearing. According to the applicant, the respondent never sought the rescission or appeal of that order.

[12] On 9 July 2018, the Western Cape High Court handed down the judgment in the Doran matter and, amongst others, ordered the first respondent to show cause why he should not be ordered to pay the costs personally. According to the applicant, the first respondent has not sought leave to appeal against that

judgment.

[13] Following the above judgments, the applicant caused the bill of costs to be taxed. This resulted in the first respondent being indebted to the applicant in the sum of R611 586.31. The various matters were taxed as follows:

- (a) The Haylock matter was taxed and allowed on 13 March 2019 for R122,717.84.
- (b) The Mouton matter was taxed and allowed on 13 March 2019 in the amount of R107,060.60.
- (c) The Simon matter was taxed and allowed on 4 February 2020 in the amount of R67,229.60,
- (d) The Doran matter was taxed and allowed on 23 September 2019 in the amount of R314,578.89.

[14] Following the above, the applicant issued a warrant of execution against the movable property of the first respondent. The Sheriff indicated in his or her return that he or she could only raise R20 500 from the attached movable property of the first respondent. It is for this reason that the applicant now seeks to execute against the immovable property of the first respondent.

[15] The property in question is bonded to the Trust. The applicant avers that the amount due to the lender, Blue Banner Securitisation Vehicle RC1 (Pty) Ltd or the Trust is unknown. The market value of the property issued by the independent evaluator is R1 450 000,00, and the local authority's evaluation of the property is R1 484 000.00. The applicant avers that the rates and taxes owing to the municipality amount to R17 292,24.

[16] The Trust did not oppose this application.

[17] The first respondent opposed the application and raised various points in this regard. He contends that the orders for which execution is sought "are currently under review or appeal." He makes the following averments in paragraph 3 of the answering affidavit:

"3.1. The Mouton order is, or will soon be, before the Supreme Court of Appeal.

3.2. The Doran order, leave to appeal, is already filed in the Cape Town High Court.

3.3. The other order is, or soon will be, subject to a rescission application."

[18] The first respondent further contends that the amount that will be raised from the sale in execution will, after settling the loan of SA Homes Loans, have no impact on the amount owed to the applicant. The proceeds of the sale in execution may also not be able to settle the SA Home Loans debt. It is for this reason that he contended that the better approach that the applicant ought to have adopted was that of seeking a monthly payment through the

Magistrate Court inquiry. He, however, does not disclose the amount owing on the bond but estimates it at R1 200 000,00.

- [19] The other point raised by the first respondent is that he has "a right to housing under the Constitution, and not to have his house "sold pointlessly." He further, in this respect, contends in paragraph 34 of the answering affidavit that the applicant has failed to place sufficient information before this court as required by rule the Rules to deserve the relief sought in the notice of motion.
- [20] The first respondent also challenged the judgments forming the basis of the writ of execution essentially on the ground that they were improper and contrary to the rule of law. He criticised one of the judgments for being wrong, arbitrary, and capricious. He contends that in one of the judgments, he was not allowed to defend himself.
- [21] In relation to the nature of the costs orders made against him, the applicant contended that the process of obtaining *de bonus propriis* orders is unconstitutional and thus invalid. The other point related to the nature of the costs orders awarded. According to him, they violate the rule of law because are disproportionate.
- [22] The process of executing against the immovable property of a judgment debtor is governed by the provisions of rule 46(1) of the Rules. The method includes execution against the residential immovable property of a judgment debtor, which is subject to the provisions of rule 46A of the Rules. Rule 46A (1) and (2) provide:

"(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.
- (b) A court shall not authorise execution against immovable property, which is the primary residence of a judgment debtor, unless the court, having considered all relevant factors, considers that execution against such property is warranted.
- (c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property."

- [23] In cases involving the execution of residential immovable property of a judgment debtor, rule 46A (2) (a) requires the court to determine whether the property is a primary residence of the judgment debtor before ordering the execution. If this is found to be the case, then the court is enjoined in terms of rule 46A (2) (b) to determine, having regard to certain factors, whether execution is warranted.

- [24] It is common cause that the property that is the subject of this application is a residential property of the first respondent. The question that then arises is whether the execution of the property would in the circumstances be warranted.
- [25] Before dealing with whether the provisions of rule 46A find application in this matter, I propose to deal firstly with some of the other points raised by the first respondent in opposing this application.
- [26] The first issue concerns whether the cost orders made against the first respondent are subject to appeal or rescission. In the Mouton order, the first respondent avers in the answering affidavit that the matter "is, or will soon be, before the Supreme Court of Appeal." The same applies to the other order in terms of which he avers, the "order is, or soon will be, subject to a rescission application. Concerning the Cape Town High Court order, he avers that leave to appeal is before the court.
- [27] The above is contradicted by the facts set out in the applicant's replying affidavit. About Hayton and Mouton matter, the applicant testifies that the leave to appeal was dismissed by Keightley J on 23 October 2018. In the Simon matter, the order which was made on 9 October 2017, no leave to appeal or rescission has been filed. In the Doran matter, the first respondent unsuccessfully sought to review the taxation of the costs order in the Western Cape High Court.
- [28] It is clear from the above that none of the above orders is subject to being set aside on appeal or subject to any rescission application.
- [29] The first respondent has also criticised the orders as being improper, invalid and unconstitutional. There is no merit in this point, as the trite principle of our law is that a court order is valid and enforceable until set aside on review or appeal. The orders that are the subject of this application have not been set aside on review or appeal, and thus this court is bound to respect them. In this respect, it is important to note that the first respondent attempted to overturn the orders because they were unconstitutional in the Constitutional Court but was unsuccessful.
- [30] I return to the issue of whether rule 46A applies in this matter. The first respondent contends in the supplementary answering affidavit that he has a right to housing under the Constitution and that right would be undermined if the sale in execution was to be authorised. He resides in the property and this is the only home he owns. He has three teenagers who do not stay with him but accommodates them in the property whenever they visit him.
- [31] 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.[1] It is now well established that the execution of immovable property by a judgment creditor has to be done with the court's oversight.

[32] In *Gundwana v Steko Development and Others*,[2] the Constitutional Court dealt with the issue where the registrar acting in terms of the Uniform Rules of the High Court granted an order declaring a mortgage home executable. The court held that the registrar's order was unconstitutional because a court did not issue it and that judicial oversight was required where the execution of a home involving an indigent person who may consequently become homeless.

[33] Recently in *Bestbier v Nedbank*,[3] the Supreme Court of Appeal, after analysing the decision in *Gudwana*, had the following to say about the provisions of rule 46A:

"Simply put, rule 46A was meant to protect indigent debtors who were in danger of losing their homes and give effect to s 26 of the Constitution."

[34] The SCA further held that section 26 (1) of the Constitution is not compromised in every case where execution is levied against the immovable property. In paragraph [20] of its judgment, the SCA said the following:

"The aim of rule 46A is to assist the court in considering whether the s 26 rights of the judgment debtor would be violated if his/her house is sold in execution. Rule 46A contains procedural prescripts, not substantive law."

[35] And further in paragraph [27], of the judgment the SCA said the following:

"[27] Due regard must be had to the impact that the sale in execution is likely to have on vulnerable and poor beneficiaries who are occupying the immovable property owned by the judgment debtor, who are at risk of losing their only homes."

[36] It is common cause in the present matter that the property is the first 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 children not being able to visit him if he was to lose the property, there is no evidence suggesting that he would not be able to afford alternative accommodation. He is a practising advocate who on his own version, has never defaulted in his bond repayment. He should on this basis be able to rent another property.

[37] In my view, the applicant has successfully made out a case for the execution of the judgment debt in the sum of R611 586. What remains to be determined is the reserve price for the sale. The first respondent has made no submission regarding the reserve price, and as indicated earlier, the second respondent has not opposed the application.

[38] The applicant has proposed the reserve price in the sum of R1 million. There appears to be no reason why this proposal should not be accepted by this court.

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

Order

[40] In the circumstances the following order is made:

1. It is hereby declared that the immovable property, referred to as unit consisting of:
 - (a) Section Number 4 as shown and more fully described on Sectional Plan No. [...] in the scheme known as 17 on Forest, in respect of land and building or buildings situated at LONE HILL EXTENSION [...] TOWNSHIP, LOCAL AUTHORITY: CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY, of which section the floor area, according to the said sectional plan, is 128 (One Hundred and Twenty-Eight) square metres in extent; and
 - (b) 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 [...] and subject to such conditions as set out in the aforesaid Deed of Transfer is declared especially executable for the following sums:
 - 1.1 In the amount of R122,717.24 together with interest a tempore morae from 13 March 2019 to date of payment;
 - 1.2 In the amount of R107,060.60 together with interest a tempore morae from 13 March 2019 to the date of payment;
 - 1.3 In the amount of R67,229.60 together with interest a tempore morae from 4 February 2020 to the date of payment;
 - 1.4 In the amount of R314,578.89 together with interest a tempore morae from 23 September 2019 to the date of payment;
2. The reserve price for the sale of the property is set at the sum R1 million.
4. The Registrar is directed to issue a writ of execution in terms of prayer 1 above;
5. The Defendant is ordered to pay the costs of the application on an attorney and client scale.

E MOLAHLEHI J

Judge of the High Court

Gauteng Local Division, Johannesburg

Representations:

For the applicant:

Adv N J Horn

Instructed by:

TM Du Toit & CO Inc.

For the respondent:

Adv. Douglas Shaw (In person)

Hearing date:

9 May 2022

Delivered:

28 June 2022

[1] See Petrus Johannes Bestbier and Others v Nedbank Limited (Case No. 150/2021)

[2022] ZASCA 88 (13 June 2022).

[2] 2011

(3) SA 608 (CC).

[3] Petrus Johannes Bestbier and Others v Nedbank Limited (Case No. 150/2021)

[2022] ZASCA 88 (13 June 2022).

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