

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Wolmarans and Another (1490/2017) [2017] ZAFSHC 188 (16 November 2017) [2017] ZAFSHC 188

COURT

Free State High Court, Bloemfontein

BEFORE

EA Pike

CASE / FILE NUMBER

1490/2017

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 1490/2017

In the matter between:

ABSA BANK LIMITED Plaintiff

and

JUSTIN WOLMARANS First

Defendant

ZINA ISABEL VORSTER Second

Defendant

CORAM: PIKE, AJ

HEARD ON: 17 AUGUST 2017

DELIVERED ON: 16 NOVEMBER 2017

[1] The plaintiff brought an application in terms of Rule 46(1) of the Uniform Rules of Court seeking the following relief:

"1. That the following immovable property be declared Executable, namely:

CERTAIN: ERF [...] D. (EXTENSION [...]) DISTRICT HEILBRON,

PROVINCE FREE STATE;

IN EXTENT: 1982 (ONE THOUSAND NINE HUNDRED AND EIGHTY TWO) SQUARE METERS;

HELD: BY DEED OF TRANSFER NO T032313/2001; SUBJECT TO THE CONDITIONS THEREIN CONTAINED

2. Cost of suit on an attorney and client scale to be taxed."

[2] The plaintiff registered mortgage bond number 92813/2008 over the property of the defendants as set out in par [1] supra in favour of itself on 27 February 2008. When the defendants failed to make timeous payments the plaintiff instituted action proceedings

against the first and second defendants by way of combined summons on 17 April 2013 wherein it sought the following relief:

"WHEREFORE THE PLAINTIFF CLAIMS FROM THE FIRST AND SECOND DEFENDANTS, JOINTLY AND SEVERALLY, THE ONE TO PAY, THE OTHER TO BE ABSOLVED:

1. Payment of the amount of R1 385 590.01;

2. Payment of Interest on the aforesaid amount at the rate of 8.5% per annum, calculated and capitalized monthly from 9 OCTOBER 2012 to date of payment, both days inclusive;

REFER TO OPEN COURT:

3. An order declaring the following immovable property specially executable:

CERTAIN: ERF [...] D. (EXTENSION [...]) DISTRICT HEILBRON, FREE STATE PROVINCE;

IN EXTENT: 1982 (ONE THOUSAND NINE HUNDRED AND EIGHTY TWO) SQUARE METERS;

AS HELD: BY THE DEFENDANTS UNDER DEED OF TRANSFER NUMBER T032313/2001.

Subject to the conditions therein contained;

4. An order in terms of which the Registrar is authorised and directed to issue a writ of execution against the immovable property;

5. Costs of suit on an attorney and client scale;

6. Further and/or alternative relief."

[3] During January 2014 the plaintiff restructured the defendants' arrears in the amount of R278 309.38. The defendants thereupon failed to make timeous monthly payments whereafter on 27 March 2014 the Registrar of this court granted default judgment against the first and second defendants in terms of the combined summons as set out in par [2] supra. After the granting of default judgment the defendants continued their failure to make timeous

payments and as a result the plaintiff brought this application to have the property declared specially executable.

- [4] The second defendant filed her answering affidavit together with the first defendant's confirmatory affidavit in response to the application by the plaintiff. They oppose the application inter a/ia on the following grounds:
1. The right to adequate housing of the defendants would be infringed if this court declares the immovable property specially executable.
 2. The property is the defendants' primary place of residence.
 3. The defendants are making monthly payments towards the debt. In terms of agreement between the parties alleged by the defendants, the arrears would only be payable at the end of the term of the bond. According to the defendants the arrears are being reduced on a monthly basis.
 4. The plaintiff should have communicated with the defendants before launching this application.
- [5] The plaintiff countered the defendants' averments in the following terms: The defendants' right to adequate housing will not be infringed by the order sought. The defendants have alternative accommodation. The arrears on the loan increase on a monthly basis and the plaintiff was entitled to bring an application without further notice to the defendants.
- [6] The matter initially served before Van Zyl, J. On 28 October 2016 the following order was made:

"IT IS ORDERED THAT:

1. The application is postponed sine die in order to grant the respondents/defendants the opportunity to pay the arrears pertaining to the Mortgage Bond with number 82813/2008, in full.
 2. The plaintiff/applicant is granted leave to, if so advised, approach Court after the expiry of a period of seven
 - (7) months from date of this order, on the same papers, duly supplemented, for appropriate relief.
 3. The costs of the application stand over for later adjudication."
- [7] As a result of the foregoing and subsequent to the defendants' failure to pay the arrears the plaintiff filed a notice of set down on 10 July 2017 for the matter to be argued on 3 August 2017. On the latter date the matter was postponed by agreement between the parties to 17 August 2017. The plaintiff filed a supplementary affidavit on 10 July 2017. The defendants also filed a supplementary affidavit, dated 14 August 2017, on 15 August 2017.

[8] It is against this background that the parties appeared before me.

[9] Mr Els, appearing on behalf of the plaintiff, submitted that the property was previously rented out to tenants, although it currently appears that the defendants are using the property as their primary place of residence. He contended that the order sought will not infringe upon the defendants' rights to adequate housing, nor that the defendants will be left without a place of abode as the defendants have other properties registered in their names that can be used as an alternative place of residence. Mr Els furthermore submitted that the property was not acquired by means of, or with the aid of, a State subsidy. It was acquired with monies advanced by the plaintiff.

[10] He furthermore contended that even though the defendants make regular payments, such payments are less than the required monthly

instalment. It causes the arrear amount to accumulate on a monthly basis. He pointed out that on 15 August 2017 the arrears

amounted to R119 611.20. Justice will not be done if another postponement is granted to the defendants.

[11] With reference to the supplementary affidavit of the defendants, mr Pienaar, appearing on behalf of the defendants, submitted that the second defendant is expecting a pension fund payment in the amount of R300 000.00 towards middle October 2017. He further submitted that although the property had previously indeed been rented out, the defendants moved back into the property after the second defendant's mother passed away.

[12] Rule 46(1)(a) states:

"No writ of execution against the immovable property of any judgment debtor shall issue until -

(i)

(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of Rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the

judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against

such property."

[13] The legal position in respect of applications to have immovable property declared specially executable has been dealt with in numerous decisions and more specifically in *Gundwana v Steko Development and others* 2011 (3) SA 608 (CC), (Case CCT 44/10 [2011] ZACC). The court held that it has to consider all relevant circumstances before ordering execution against the property if such property is the judgment debtor's primary residence. Froneman, J at par [54] further declared that:

".....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."

[14] In *First Rand Bank Ltd v Folscher and Another*, and *Similar Matters* 2011 (4) SA 314 (GNP), Bertelsmann, J, dealt with the application of Rule 46(1)(a)(ii) as follows;

"40. It is obviously impossible to provide a list of circumstances that might be regarded as extraordinary which would persuade a court to decline a writ of execution. They would usually consist of factors that would render enforcement of the judgment debt an abuse of the process, which a court is obliged to prevent, see *Hudson v Hudson* 1927 AD 259, *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 734F: "an abuse of the process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective ... " Instances of this nature would fall into the category enumerated by Mokgoro J in *Jaftha*, supra and encountered in *Absa Bank Ltd v Ntsane & another* [2006] ZAGPHC 115; 2007 (3) SA 554 (T). As is apparent from these examples, the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be iniquitous because the debtor will lose his home while alternative modes of satisfying the creditor's demands might exist that would not cause any significant prejudice to the creditor.

41. Mindful of the impossibility to anticipate every potential circumstance, some of the following factors that may need to be taken into consideration by the court when deciding whether a writ should issue or not, are:
- Whether the mortgaged property is the debtor's primary residence;
 - The circumstances under which the debt was incurred;
 - The arrears outstanding under the bond when the latter was called up;
 - The arrears on the date default judgment is sought;
 - The total amount owing in respect of which execution is sought;
 - The debtor's payment history;
 - The relative financial strength of the creditor and the debtor;
 - Whether any possibilities exist that the debtor's liabilities to the creditor may be liquidated within a reasonable period without having to execute against the debtor's residence;
 - The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;

- Whether any notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
- The debtor's reaction to such notice, if any;
- The period of time that elapsed between delivery of such notice and the institution of action;
- Whether the property sought to have declared executable was acquired by means of, or with the aid of, a State subsidy;
- Whether the property is occupied or not;
- Whether the property is in fact occupied by the debtor;
- Whether the immovable property was acquired with monies advanced by the creditor or not;
- Whether the debtor will lose access to housing as a result of execution being levied against his home;
- Whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- The position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

It is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact bound to identify the criteria that are relevant for the particular case."

[15] It is against the background of these principles that the facts of this matter should be considered.

[16] Summons was served on 8 May 2013 on mr Cloose, a tenant, occupying erf [...] D., EXTENSION [...]. The second defendant admitted in an email dated 11 July 2013, annexed to the plaintiffs replying affidavit as annexure 11RA1", that she owns three other properties, being 2 vacant stands and another fully paid up property which her mother occupies. In her answering affidavit, dated 4 April 2016, the second defendant avers that she and the first defendant resides at erf [...] D., Extension

1. She also stated that her mother died and that a memorial service was held on 2 April 2016. From the above it is clear that the defendants indeed have alternative places of residence.

[17] A transaction history statement was handed in by mr Els stating that on 2 August 2017 the outstanding capital amount, including arrears, was R1 463 577.94. During 2008 the bond was registered for an amount of R1 300 000.00. Summons was issued during April 2013 for the total outstanding amount of R1

385 590.01. On 15 August 2017 the arrears amount was R119 611.20. It is therefore clear to me that the defendants experience difficulty to meet their obligations in terms of the loan. After 9 years of making bond payments the defendants have not lowered the capital amount; in fact, it has increased substantially.

[18] The defendants, in order to secure the loan, mortgaged the property during 2008 in favour of the plaintiff with the knowledge that the plaintiff would be entitled to rely on its security and to seek an order to have the property declared specially executable in the event of non-payment by the defendants. The only security for the plaintiff is the mortgage bond registered over the property

[19] However, from the above it is clear that the proportionality of prejudice the plaintiff might suffer if execution were to be refused outweighs the prejudice the defendants would suffer if execution goes ahead.

[20] Considering the history of this matter, the substantial increase in the total amount outstanding and the defendants' continued difficulty to pay the instalments and arrears, the only viable manner in which the plaintiff's interests can be protected is by means of the granting of the relief sought herein.

[21] However, in her answering affidavit, dated 4 April 2016, the second defendant alleged that an anticipated R250 000.00 will devolve upon her within a year as beneficiary of her mother's estate. On date of hearing this application, the inheritance had not yet been received and no mention was made of it. However, as previously mentioned, according to the second defendant, she was expecting a pension amount of R300 000.00 towards September/ October 2017. In view hereof I am inclined to grant the defendants a further indulgence for a short period of time, as will be evident from my order.

[22] In respect of the costs, the plaintiff seeks costs to be paid on an attorney and client scale. The defendants conceded costs. As clause 12 of the mortgage bond determines that the defendants will be liable for costs on an attorney and client scale, I see no reason why I should not make such an order.

[23] Wherefore I make the following order:

1. The property described as

Erf [...] D. (EXTENSION [...]) district Heilbron, Free State Province;

In extent 1982 (One Thousand Nine Hundred and Eighty Two) square meters;

Held by Deed of Transfer number T032313/2001 is declared specially executable;

2. The registrar is authorised to issue a writ of execution to give effect to the aforesaid order;

3. The sheriff is authorised to attach the immovable property in paragraph 1, supra.

4. The procedures subsequent to the aforesaid attachment, including the sale in execution, are stayed until 15 January 2018 in order to give the defendants the opportunity to pay the arrears in full, failing which the sheriff is authorised to proceed with the mentioned procedures and the sale in execution.
5. The defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application on an attorney and client scale, which costs shall include the costs of 5 May 2016.

EA PIKE, AJ

On behalf of plaintiff: AdvJ Els

Instructed by:

ECCooper & Majiedt Inc

Bloemfontein

On behalf of defendants: Adv T Pienaar

Instructed by:

Lovius Block

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