

SOUTH AFRICA / JUDGMENT

# Firststrand Bank Limited v Moodley (2015/28061) [2016] ZAGPJHC 107 (10 May 2016)

[2016] ZAGPJHC 107

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

L Adams

## CASE / FILE NUMBER

2015/28061

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2015/28061

DATE:

10 MAY 2016

In the matter

between:

FIRSTRAND BANK

LIMITED.....Applicant

And

MOODLEY,

LOGAVINOTHA.....Respondent

**JUDGMENT**

ADAMS AJ:

[1]. On the 28th April 2016, I granted judgment in favour of the applicant against the respondent for payment of the sum of R1,218,357.29, together with interest thereon and cost of suit on the attorney and client scale. The applicant's application to have immovable property of the respondent declared specially executable and for the issue of a warrant of execution against the said property, I postponed sine die. I undertook to furnish reasons for the order at a later stage. The following are the reasons.

[2]. The applicant's application is founded on written mortgage loan agreements, which were granted against security of a first and second mortgage bond which were registered over the respondent's property in favour of the applicant.

[3]. The respondent opposed the application on a number of grounds, most of which were of a technical legal nature.

#### THE RESPONDENT'S LEGAL DEFENCES

[4]. The respondent alleges that the person who deposed to the applicant's founding affidavit was not authorised to launch the application. As far as that defence is concerned, I agree with the submissions on behalf of the applicant that the principles enunciated in *Eskom v Soweto Town Council*, 1992 (2) SA 703 (W), find application herein. It is trite that when an attorney who acts on behalf of a party is authorised so to act, there is no need for any other person to be additionally authorised.

[5]. The respondent also alleges that the provisions of the National Credit Act has not been complied with in that the section 129 notice was never received by him.

[6]. Again, I am in agreement with the submissions made on behalf of the applicant that this legal point should fail. In the matter of *S A Taxi Development Finance v Phalafala*, (an unreported GSJ Judgment of Van Eeden J, in which the following principle was laid down:

'Non – receipt of the notice prior to receiving the summons is not a defence dilatory or otherwise, to the plaintiff's claim in this matter. The subsequent receipt of the notice at the time of the service of the summons and the defendant's reaction thereto, entitle the plaintiff to approach the court for an order to enforce the credit agreement. No purpose would be served to give him the notice for a second time – it would be placing form above substance to require a further notice to be sent to the defendant. It is accordingly unnecessary to adjourn the matter or to make an order in terms of s 130(4)(b), since the defendant actually received the notice and since the time periods of S 130(1) and (1)(a) have actually expired. I consequently find that the fact that the defendant did not receive the notice prior to the service of the summons 'does not render the notice invalid and the issue of the summons premature'.

[7] Therefore, the respondent's second point in limine I also dismissed.

- [8] On the merits the respondent alleges that the acceleration clauses in the mortgage loan agreements are unlawful in that there has not been compliance with the provisions of section 64 of the National Credit Act, which requires the applicant to have produced the credit agreement in plain and understandable language. The respondent also alleges that the said agreements fall foul of other provisions of the said Act.
- [9] I reject the submissions in that regard on behalf of the respondent on the basis that the procedural requirements of the Act had been complied with. As for the substantive requirements, I am of the view that the respondent has not demonstrated that her attention was not drawn to the acceleration clauses in the agreements. In any event, the respondent ought reasonably to have been aware of these clauses.
- [10] Finally, the respondent claims that she should not be held liable in terms of the agreements as the applicant was guilty of ‘reckless lending’.
- [11] I am not persuaded that the respondent has made out a defence based on ‘reckless lending’.
- [12] None of the requirements relative to a defence based on ‘reckless lending’ as set out in *S A Securitisation v Mbatha*, 2 011 (1) SA 310 (GSJ), were set out by the respondent. In fact, the respondent failed to place before me any information which would have enabled me to find that there was reckless lending.
- [13] In the premises, I was of the view all of the respondent’s defences on the merits of the applicant’s claim, should fail and I ruled thus on the 28th April 2016.

#### THE RULE 46(1)(A) CONSIDERATIONS

- [14] Uniform Rule 46(1)(a) provides that no writ of execution against the immovable property of any judgment debtor shall issue until —
- (i) ‘a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
- (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’.
- [15] The 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).
- [16] 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.

[17] 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’.

[18] In *Jaftha v Schoeman; Van Rooyen v Stoltz*, [2004] ZACC 25; 2005 (2) SA 140 (CC), the Constitutional Court gave the following examples of such circumstances:

18.1 Whether the rules of court have been complied with;

18.2 Whether there are other reasonable ways in which the judgment debt can be paid;

18.3 Whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;

18.4 The circumstances in which the judgment debt was incurred;

18.5 Attempts made by the judgment debtor to pay off the debt;

18.6 The financial position of the parties;

18.7 The amount of the judgment debt;

18.8 Whether the judgment debtor is employed or has a source of income to pay off the debt;

18.9 Any other factors relevant to the particular case.

[19] In *Nedbank Ltd v Mortinson*, [2005] ZAGPHC 85; 2005 (6) SA 462 (W), the full court of this division laid down the following rules of practice applicable in all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable. It was held that the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:

‘33.1.1 The amount of the arrears outstanding as at the date of the application for default judgment.

33.1.2 Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.

33.1.3 Whether, to the knowledge of the creditor, the immovable property is occupied or not.

33.1.4 Whether the immovable property is utilised for residential purposes or commercial purposes.

33.1.5 Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

[20] In *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*, 2011 (4) SA 314 (GNP), the full court of the North Gauteng High Court, Pretoria, observed the following:

‘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.'

[21] 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.

[22] Applying the foregoing principles in casu, I am of the view that before ordering execution against the immovable property of the respondent, I should have regard to the following circumstances:

22.1 By all accounts, the applicant has complied in all respects with the court rules applicable to the type of relief sought in this application. Additionally, the applicant has complied with the provisions of the Practice Manual of this division as well as the guidelines contained in the relevant case authorities.

22.2 There have obviously not been any attempts by the applicant to execute against the movable property of the respondent, as the monetary judgment was only granted by me on the 28th April 2016.

22.3 These proceedings were only commenced during August 2015 and it is not altogether clear whether there are possibilities that the respondent will liquidate her indebtedness within a reasonable period without the applicant having to resort to executing against the residence of the respondent.

22.4 The judgment debt due by the respondent to the plaintiff is for the sum of R1,218,357.29, plus interest thereon and costs of suit. As and at the date of the filing of the rule 46(1) application during August 2015, the total sum outstanding amounted to R1,218,357.6298. The last payment received from the respondent an amount of R13,000.00 received was on the 27th October 2015, and the amount of the arrears was a sum equal to approximately 5 months' worth of instalments.

22.5 It appears that the respondent lives at the property with other members of her family. There is however no evidence that any of the occupants are what can be described as vulnerable.

22.6 The property in question has, by all accounts, not been purchased with the assistance of a Government Housing subsidy.

22.7 The relative financial strengths of the applicant and the respondent is a consideration which favours the respondent.

22.8 On the available evidence, especially the fact that the respondent seems eager to try and resolve this matter with the applicant, I am of the view that not enough has been done by the applicant to attempt in the spirit of the above cited authorities to find a solution to the respondent's difficulties in this matter.

[23] These factors, in my view, mitigates in favour of the respondent, who, I believe, if given a chance, may be able to resolve the issue of the arrear instalments.

[24] In the circumstances of this matter, I was of the view that it will be unjust and iniquitous to order that the property of the respondent be declared to specially executable.

#### ORDER:

For all the above considerations, I made the order referred to in para [1] above, which read as follows:-

Judgment is granted in favour of the applicant against the respondent for:

1. Payment of the sum of R1,218,357.29 (one million two hundred and eighteen thousand three hundred and fifty seven rand and twenty nine cents).
2. Interest on the aforementioned amount at 7.50% per annum, calculated daily and compounded monthly from the 30th June 2015 to the 23rd July 2015, and at 7.75% per annum from the 24th July 2015, to date of final payment.
3. Cost on the attorney and client scale.

The application for judgment in terms of prayers 3 & 4 of the Notice of Motion was postponed sine die.

L ADAMS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 28th April 2016

JUDGMENT DATE: 10th May 2016

FOR THE PLAINTIFF: Adv L Van Rhyn Tonder

INSTRUCTED BY: Lowndes Dlamini

FOR THE DEFENDANT: Mr G Moodley

INSTRUCTED BY: Moodley Attorneys

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Prepared on 13 October 2026 · Esheria