
SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Ortell and Another (332 /2012) [2013] ZANCHC 49 (28 June 2013)

[2013] ZANCHC 49

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

332 /2012

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IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NR:332 /2012

FIRSTRAND BANK LIMITED

APPLICANT

AND

LEONARD PETER ORTELL

1ST RESPONDENT

REBEKKA ORTELL

2ND RESPONDENT

DATE HEARD: 03 May 2013

JUDGMENT DATE: 28 June 2013

JUDGMENT

PHATSHOANE J.

1. FirstRand Bank Limited, the applicant, approached this Court for an order to declare the property known as [...], situated in the Sol Plaatje Municipality, District Kimberley, in extent 317 square metres ([...]) held by Deed of Transfer T 1250/2008 executable. The Property is registered in the names of Mr Leornard Peter Ortell and Ms Rabekka Ortell, the first and second respondents.
2. FirstRand Bank lent to the respondents an amount of R378 000.00 against security of a first mortgage bond which was registered over the property on 02 June 2008. On 20 July 2012 the Bank obtained summary Judgment against the respondents for the payment of an amount of R432 180.55 together with interest on the amount mentioned at the rate of 8.35% calculated daily and compounded monthly from 08 February 2012 to date of final payment and costs. At the time of granting the summary judgment against the respondents my sister Huges-Madondo AJ was not inclined to declare the respondents' property specially executable because no representations or relevant circumstances were placed before her as envisaged in s 26(1) of the Constitution of the Republic of South Africa Act, 108 of 1996. My sister was further of the view that the Bank had not established, in terms of Rule 46(1), that the respondents had sufficient movable property to satisfy the judgment debt.
3. Rule 46(1) provides:

“(1) (a) 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.”
4. In terms of the Home Loan Agreement entered into between the parties the respondents' monthly repayment amount to the Bank was R4 708.57 at a variable interest rate linked to the Bank's prime overdraft rate which was to be adjusted with each change in the Bank's prime overdraft rate. At date of filing of this application, on 11 December 2012, the respondents were in arrears in the sum of R90 941.04. The certificate of balance dated 27 November 2012 reflects the amount due and payable by the respondents to the Bank as R474 946.12. In the last statement of account received from the Bank the outstanding balance was R481 280.55. The respondents deny that they are in arrears in the last amount. They also dispute the correctness of the calculation of the total amount due and payable to the Bank.
5. The respondents underwent a debt restructuring process and were declared over indebted in terms of the Magistrates' Court order dated 22 June 2011. Following this order their proposed fixed payment obligation, for the debt review period, toward the Bank was R685.44

per month. They effected payment on 18 July 2011, 04 August 2011 and 08 September 2011 in the amounts of R699.16; R1685.36 and R377.42 respectively. For the months of October 2011 until February 2012 (5 months) up to the time when the Bank issued summons against them no further payments had been made to the Bank. The Bank states that anent the requirements of s 88(3) of the National Credit Act, 34 of 2005, it was entitled to issue summons against the respondents consequent on the default. Section 88 (3) provides:

“(3) Subject to section 86 (9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86 (4) (b) (i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until-

- (a) the consumer is in default under the credit agreement; and
 - (b) one of the following has occurred:
 - (i) An event contemplated in subsection (1) (a) through (c); or
 - (ii) The consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.”
6. What should be determined is whether the relevant circumstances and facts were placed before the Court which renders execution against the respondents’ property undesirable. The circumstances which the Court should consider in its judicial oversight over the sale in execution against the immovable properties of judgment debtors are countless and diverse. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC) at 161-162 para 56-59 the Court held:

“[56] It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided. If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.

- [57] It is for this reason that the size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor. However, this will depend on the circumstances of the case. As has been pointed out above, it may often be difficult to conclude that a debt is insignificant. In this regard, it is important too to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur.

- [58] Another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.
- [59] A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home. At present, s 73 of the Act provides for a judgment debtor to approach a court with an offer to pay off a debt in instalments. As pointed out above, this section does not constitute sufficient protection for indigent debtors because they are generally unaware of its potential to protect them and their inability to invoke it..”
7. Mr Buys, for the respondents, submitted that the Court should take into account that the respondents are under debt review and that since this process was set in motion regular payments in terms of the rearrangement proposal were made.
8. Following the issuing of the summons, as adumbrated hereinbefore, the Bank made an application for summary Judgment which the respondents opposed. The basis of the opposition essentially was that they had been in financial difficulties which resulted in an order declaring them over indebted. As a result their obligations were restructured. They made regular payments to the National Payment Distribution Agency as was required in terms of the debt restructuring order. Due to the Agency's administrative “system error” which they were unaware of, not all the payments made by them to the Agency were distributed to the Bank. They were also unaware that the Bank did not receive payment. Therefore, they cannot be blamed for the default in payments. It was only upon receipt of the summons that they became aware that the Agency had not played its part.
9. The issues referred to in the preceding paragraph are being raised once more in the papers before me. I do not intent to dwell on them simply because they were ventilated in the summary judgment of my sister, Huges-Madondo J, who found that the respondents had defaulted on the re-arrangement order and that the Bank was entitled to enforce the credit agreement. It suffices to mention that the whole amount claimed is now due and immediately payable. Since the summary judgment was granted against the respondents no serious attempts have been made by them to show what measures they have put in place to ensure that the judgment debt was satisfied. In addition, nothing was placed before the Court to demonstrate what efforts the respondents took to correct the situation with regard to the non-distribution of the funds by the Agency to the Bank. Seyffert And Another v FirstRand Bank Ltd t/a First National Bank 2012 (6) SA 581 (SCA) at 587para 15 the Court remarked:

“15...It may well be pointless in most cases where the matter has already been referred to a debt counsellor to do so again. Indeed, a court should be slow to exercise its discretion to make either of the orders envisaged in s 85 where the matter has been dealt with by a debt counsellor, or a debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated.”

10. The Bank says that from what it could ascertain the property in issue is not the primary residence of the respondents. It attached the XDS search results showing that the respondents own another property known as 17 Frere Place in addition to the property sought to be declared executable. In their answering affidavit the respondents intimated that the property susceptible to execution is their primary residence and they have no alternative accommodation. They sold 17 Frere Place during 2007.
11. It does not end here because the XDS search results also reflects that the respondents own a further property situated at [...]

Kimberley, purchased on 03 December 1996. This latter property is registered in the second respondent's name and is held under Title Deed No T3785/1999. The respondents have not placed any facts before Court on the situation relevant to this property. They seek leave, belatedly, in their heads of argument to file a further affidavit to address this omitted aspect.

12. The first respondent explained that he is the breadwinner who has to support his unemployed wife, the second respondent, and their five children aged 6, 10, 15, 20 and 22 years. The respondents' 22 year old child, Mast Ortell, is disabled and suffers from Muscular dystrophy. The respondents intimate that Mast's medical condition places a huge financial burden on them.
13. In a quest to accommodate the respondents' dire situation, at least on two occasions, the Bank has unsuccessfully attempted to levy execution against their movable assets at their chosen domicilium (Erf [...]). The returns of non-service record that the property is kept locked. The sheriff also tried to execute at 17 Frere Place but was informed by the occupier that the respondents had left the address. The respondents intimated that they are unable to comment on the Banks' endeavour to execute against their movable assets because the second respondent is a 'stay-at-home mom' who looks after the parties' disabled child for 24 hours. They bear no knowledge of the sheriff's visit and they did not receive any warning messages from him. What the respondents are not saying is that they indeed have sufficient movable assets to satisfy the debt.
14. It is not in dispute that the property in issue served as security for the home loan advanced to the respondents. The home loan was granted subject to a covering mortgage bond being registered in favour of the Bank over the property securing the capital amount. In *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) at 495 para 34 the Court pronounced:

- [34] ...The right to housing is not an absolute right; and it is a right to adequate housing, not to housing that a mortgagor is unable to afford. In the context of hypothecation, the defendant-mortgagor's right to ownership of his or her home must, in general, yield to the mortgagee's right to realise its security.

The Court proceeds at 479 para 37:

"[37] The fact that the mortgaged property is the defendant's family home is, in itself, not a reason to deny the mortgagee's contractual right to realise its security. Indeed, by giving the property in security the defendant voluntarily derogated from the extent of his full dominium over the property in favour of the bank. He did so for his own benefit and upon an undertaking in favour of the bank that, if he defaulted in his payment obligations to the bank, the full amount owed by him would become immediately due and payable, and the property given as security could be sold to realise the funds to settle the debt."

15. The Full Bench held in *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) at 125 para 20:

"[20] Having regard to the importance of the concept of the hypothecation of immovable property in the economic context and the crucial part it plays in facilitating private means of access to housing, thereby affording some collateral assistance to the State in the discharge of its obligation to achieve the progressive realisation of the right by the entire population, it would be counter-productive to impede the efficient functioning of the concept by introducing, without cogent reasons, novel and onerous procedural impositions on mortgagees seeking to exercise their contractual rights of security. Unnecessarily imposing constraints that would make obtaining

orders

for execution, that the Constitutional Court has confirmed should ordinarily follow in foreclosure cases, significantly more costly or cumbersome would, in the end, only be to make access to mortgage finance more difficult, and redound against the wider realisation of rights under s 26(1) of the Constitution."

16. The amount the respondents owe to the Bank is relatively significant. I am not swayed that there are alternative means to secure the payment of the judgment debt other than the odious execution against their immovable property. The application by the Bank should succeed.
17. Clause 2.14 of the loan agreement sanctions the recovery of costs against the respondents in the event the Bank approaches the Court to enforce the agreement. Therefore, there is no reason why the costs should not follow the success.

Order:

18. In the result I make the following order:

1. In terms of Rule 46(1)(a)(ii) of the Rules of Court, the property known as [...], situated in the Sol Plaatje Municipality, District Kimberely, Northern Cape Province, in extent 317 Square Metres, held by Mr Leonard Peter Ortell and Ms Rebekka Ortell, the first and second respondents, in terms of Deed of Transfer No 1250/2008, is declared executable.
2. The respondents are to pay the costs of the application.

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

FOR THE APPLICANT:

ADV H J BENADE INSTRUCTED BY VAN DE WALL & PARTNERS

FOR THE RESPONDENTS: ADV K BUYS INSTRUCTED OERTELL ATTORNEYS

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Prepared on 12 October 2026 · Esheria