

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Salm and Others (41829/2019) [2023] ZAGPJHC 993 (5 September 2023) [2023] ZAGPJHC 993

COURT

South Gauteng High Court, Johannesburg

BEFORE

T Lipshitz

CASE / FILE NUMBER

41829/2019

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IN THE HIGH COURT OF

SOUTH AFRICA,

GAUTENG DIVISION,

JOHANNESBURG

CASE NUMBER: 41829/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

05/09/23

In

the matter between:

FIRSTRAND
BANK LIMITED
Plaintiff
and

SALM: NIGEL TIMOTHY
First
Defendant
BLOOM-SALM,
GREGORY
Second
Defendant
THE CITY OF
JOHANNESBURG
METROPOLITAN
MUNICIPALITY
Interested
Party/Third Defendant

JUDGMENT

T LIPSHITZ AJ

The matter was heard on 11 April 2023

Judgment

Delivered on 05 September 2023

1. The plaintiff is seeking both a money judgment in the amount of R 943 945, 82 together with interests and costs arising out of the first defendant's breach under a mortgage bond agreement and an order in terms of Rule 46A of the Uniform Rules of Court declaring the first defendant's Immovable Property situated at ERF [...] Melville Township, Registration I R, Province of Gauteng, held by deed of transfer no T48580/3006 ("immovable property") specially executable and authorising the Register of this Court to issue a warrant of execution against the Immovable Property.
2. Mr Gregory Bloom-Salm arrived at Court on 06 April 2021, when this application was initially set down and sought an opportunity to oppose the application. He was provided this opportunity, and he was placed on terms to file his answering affidavit. Mr. Bloom-Salm filed an answering affidavit on 15 April
2021. Mr Bloom-Salm, from there on out, conducted himself as if he were a party to the litigation, filed the requisite heads of argument, and appeared on the day this matter was argued before me to present his defence. The plaintiff further treated him as if he were a party to the litigation by replying to his answering affidavit, giving credence to his defence in its heads of argument and serving a set-down of the application on him. While Mr Bloom-Salm did not formally seek to intervene as a party, it was clear that this was his intention.

3. He has a legal interest in this matter as he married the first defendant in community of property on 27 October 2007 in community of property which marriage subsists. Moreover, he primarily resides and works at the immovable property. The plaintiff's counsel informed me that the plaintiff consented to Mr. Bloom-Salm intervening as a party to the action. Accordingly, an order is made that Mr. Bloom-Salm is given leave to intervene and be joined to these proceedings as the second defendant.
4. The first defendant has not defended the action.
5. The second defendant does not dispute that the mortgage bond is in arrears and to the extent as contended by the plaintiff. The nub of his defence is that due to a litany of unfortunate events in his life, he has been unable to meet the obligations of the joint estate, especially without the assistance of the first defendant, who has abandoned him and the immovable property, immigrated to the United Kingdom and has no interest in maintaining the immovable property. He further contends that he has designed a business plan that, if implemented, will turn around the guesthouse, which he runs from the immovable property, to render it profitable and place him in a financial position to repay the arrears and current instalments.

Factual Matrix

6. The plaintiff and the first defendant concluded a written loan agreement on 30 June 2006, where the plaintiff lent and advanced an amount of R 1 400 000, 00 to the first defendant. The loan agreement was subject to the registration of a mortgage bond in favour of the plaintiff. The first defendant breached the terms of the loan agreement by failing to maintain his monthly instalments as contemplated by the agreement. At the time the summons was launched, the first defendant had been in breach for 5.6 months, and the arrears had accumulated to an amount of R 77 487, 24
7. Between December 2020 and April 2023, no significant payments were made by either the first or second defendant to repay the loan. The arrears on the date that the matter was argued had escalated to an amount of R 490 513, 00. The second defendant raises no defence at law to the plaintiff's claim regarding the money judgment.
8. The updated certificate of balance reveals that on 11 April 2023, the total accelerated amount of the judgment debt was R 1 030 563, 72.
9. In the premise, the only real issue for the Court to consider is whether the immovable property should be declared executable and, if so, what the reserve price for the immovable property should be.
10. The second defendant confirms in his affidavit and during argument that the first defendant no longer resides at the immovable property as he has immigrated to the United Kingdom. It appears as if the first defendant has lost all interest in the immovable property. Thus, the immovable property is not the primary residence of the first defendant.

11. That being said, Rule 46A of the Uniform Rules of Court still finds application in this action due to the immovable property being

jointly owned by the first and second defendant by virtue of their marriage in community of property and on the basis that the second defendant resides at the immovable property. The applicability of Rule 46A to this factual matrix is apparent from the findings in the matter of *Bestbier and Others v Nedbank Limited - 2022 JDR 1636 (SCA)*, where the Supreme Court of Appeal found that “It is important to have a preceding enquiry in all cases where the immovable property of the judgement debtor is used as residential

immovable property. This preceding enquiry should be directed at establishing whether the persons occupying the immovable property in question are of the “Jaftha Kind”. The plaintiff’s counsel has correctly conceded that the second defendant is a person occupying the property of the “Jatha

Kind”.

12. Rule 46A deals with the procedural rules for executing a judgment debt against a residential immovable property. It sets out that once a Court has established that Rule 46A is applicable, the Court must inquire whether there are alternative means by the judgment debtor of satisfying the judgment debt and also consider all factors to determine whether the execution against the immovable property is warranted.
13. Before considering the relevant considerations that the second defendant requests the Court to consider, it would be apposite to consider whether there has been compliance with the procedural requirements as required by Rule 46A and specifically with personal service on the judgment debtor.

Personal Service

14. In terms of Section 46A(3)(d), it is incumbent on a plaintiff to serve the judgment debtor personally. It is common cause that in this matter, the first defendant, who is the judgment debtor, has not been served personally in that:-

14.1. the summons and particulars of claim were served on the first defendant on 29 November 2019 by way of the sheriff serving same on the second defendant at the chosen domicilium citandi et executandi;

14.2. on 04 February 2021, the sheriff served the default judgment application on the first defendant by affixing it to the immovable property; and

14.3. the various notices of set downs have been served via the respective defendants’ e-mail addresses on the first and second defendants.

15. On 25 July 2020, the first defendant responded to an e-mail from the plaintiff's attorney of record, using the same e-mail address on which the plaintiff served the notice of set downs, stating that he believed there had been a material non-joinder of his husband, the second defendant, to the plaintiff's action. He believed the plaintiff needed to withdraw its action and commence de novo.
16. I am satisfied that the e-mail of 25 July 2020 evidence that the first defendant is aware of the proceedings and, therefore, with this knowledge, elected not to oppose the application.
17. Moreover, I am mindful that where execution is being sought, and the immovable property is not the primary residence of the judgment debtor, personal service is not a requirement.
18. In casu, it is common cause that the first defendant, the judgment debtor, does not primarily reside in the immovable property. He is aware of the proceedings; thus, there has been substantial compliance. The second defendant, the party at the peril of losing his primary residence, has opposed the application and placed his defence before the Court. Accordingly, I am satisfied that there has been proper service of the action and application to declare the immovable property executable on the first and second defendants.

RULE 46A CONSIDERATIONS

19. Rule 46(2)(1)(ii) requires a Court to consider alternative means by the judgment debtor of satisfying the judgment debt other than the execution against the judgment debtor's primary residence.
20. The second defendant explained that he operates a guesthouse from the immovable property. Due to the COVID-19 travel restrictions and the legislated lockdown, business was negatively impacted. The first defendant fell into arrears with the City of Johannesburg ("COJ"), resulting in the electricity to the immovable property being disconnected. This exasperated the difficulties facing the guesthouse. He further complained about the manner in which COJ treated him. He contends the conduct of COJ has prevented him from resolving this issue. He alleges he has formulated a business plan that involves obtaining investment to place the immovable property off the grid, resolving the electricity issue. He projects that this will result in the guest house again becoming profitable, putting him in a position to repay the arrears. There are several difficulties with the second defendant's proposal, including:-

20.1. On the second defendant's version, funding for this business plan is not guaranteed or probable. This can be found as the party he is seeking funding is aware of this court action and other court actions involving a second property adjacent to the immovable property. The guesthouse is being run from both these properties. This second property is also at risk of being declared executable due to non-payment of the mortgage bond thereto. The investors have indicated that they will only consider funding the second defendant after the court actions have been resolved. The second defendant has not provided a fixed date when he would be able to repay the arrears, and his plan does not appear objectively achievable.

20.2. The plaintiff has received no payments since March 2021, when a payment was made in the nominal amount of R450.00.

20.3. Notably, even during 2021 and 2022, when the bookings report uploaded by the second defendant disclosed that the guesthouse was in operation and earning an income, the first and second defendants failed to use any of the proceeds earned to reduce the arrears owing to the plaintiff.

20.4. The second defendant has no concrete plans regarding a date as to when he will be in a position to pay the arrears or even a concrete payment plan that would be objectively achievable.

20.5. Notably, the action was instituted before COVID-19. Accordingly, it is evident that the proceeds from the guesthouse were insufficient to cover the mortgage bond instalments, even before the challenges that the second defendant relies on to explain the first defendant's default.

20.6. The first defendant appears hopelessly indebted to the plaintiff with no objective ability to repay the arrears in that:-

20.6.1. The arrears on the immovable property are R490 513, 00;

20.6.2. According to the COJ statement uploaded by the second defendant, the first and second defendants are liable to the City of Johannesburg in the amount of R 894 177, 89.

20.6.3. The second defendant confirmed that he and the first defendant have not serviced the debt of the first defendant's immovable property, which is adjacent to the immovable property in question. As a result, that property is also at risk of being declared executable.

21. In the premise, and after considering all the relevant circumstances, it is apparent that the first and second defendants have no alternative means to satisfy the judgment debt. Moreover, the first and second defendants have not made significant efforts to pay off the debt.
22. The only available option for the plaintiff to obtain payment of the judgment debt is by executing against the immovable property.
23. I find that there is no disproportionality between the means used in the execution process to exact payment of the judgment debt compared to available means to attain the same purpose. There has been no abuse of the court process by the plaintiff in instituting these proceedings, in that the plaintiff has set out in its Affidavit in Support of Default Judgment that it made efforts to provide the first defendant with an opportunity to repay the arrears before action was instituted. Moreover, considering the action was launched in 2019, the first and second defendants have had more than ample opportunity to make payments of the arrears, and they

have been unable to do so.

24. Accordingly, I find that an order declaring the immovable property specially executable is warranted.

RESERVE PRICE

25. According to the FNB property valuations, the market value of the immovable property is R 1 600 000, 00, 00. The municipal valuation of the property is R 2 032 000,00.
26. Accordingly, the median between the market and municipal values is R 1 816 000. 00.
27. The amount owing to the City of Johannesburg is R 894 177, 89.
28. The standard approach to calculating the reserve price is calculating 70% of the median value of the property and then deducting the amounts owing to the City of Johannesburg. This would yield a reserve price in the amount of R 377 022, 11. I am concerned that this amount is too low and will not serve the interests of any of the parties. Therefore, I find that the reserve price should be the amount suggested by the plaintiff, being in the amount of R 591 572, 68.
29. I find no reason to deviate from the ordinary rule that costs follow the result. The agreement provides attorney and client costs, which I will award in favour of the plaintiff.
30. Consequently, I make the following order:

Order

1. Mr. Bloom-Salm is granted leave to intervene and is joined to these proceedings as the Second Defendant.
2. Judgement is granted against the First Defendant for:-
 - 2.1. Payment of the amount of R 943 945, 82 plus interest on the amount of R 943 945, 82 at the rate of 8.3% per annum, calculated daily and compounded monthly in arrears from 30 October 2019 to the date of payment, both dates inclusive.
3. The immovable property more fully described hereunder is declared specially and immediately executable, namely,

ERF [...] MELVILLE TOWNSHIP

REGISTRATION DIVISION I.R., PROVINCE GAUTENG

MEASURING 743 SQUARE METRES

HELD BY DEED OF TRANSFER T48580/2006

SUBJECT TO THE CONDITIONS CONTAINED THEREIN

("The Mortgaged property")

4. The Registrar of the Court is directed to issue a warrant of execution to enable the Sheriff of the Court to attach and execute upon the Mortgaged Property described in paragraph 2 above and to sell the property in execution, in satisfaction of the judgment debt, interest and costs.
5. A reserve price be set for the sale of the Mortgaged Property by the Sheriff on auction in the amount of R 591 572, 68.
6. The Plaintiff is authorised to approach this Court on the same papers (duly supplemented) for a variation of the reserve price if a change in the factors influencing the reserve price necessitates a change of the reserve price.
7. The First and Second Defendants are advised that the provisions of Section 129(3)(a) and (4) of the National Credit Act 34 of 2004 ("NCA") may apply to the judgment granted in favour of the Plaintiff.
8. The First and Second Defendants may prevent the sale of the Mortgaged Property if the First and Second Defendants pay to the plaintiff all of the arrear amounts owing to the Plaintiff, together with the Plaintiff's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement before the property being sold in execution.
9. The arrear amount, enforcement costs and default charges referred to above may be obtained from the Plaintiff.
10. The First and Second Defendants are advised that the amount is not the full amount of the judgment debt but the amount the First and Second Defendants owe to the Plaintiff without reference to the accelerated amount.
11. A Copy of this order is to be served on the First and Second Defendants as soon as practicable after the order is granted but before any sale in execution.
- 11.1. The Plaintiff is granted leave to serve the order on the First Defendant via e-mail at his e-mail address [...]
12. The First and Second Defendants are to pay the costs of this application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

T Lipshitz AJ

Acting Judge: Gauteng Division Johannesburg

(electronic signature appended)

05 September 2023

Attorneys for the Plaintiff

Lowndes Dlamini Attorneys

Counsel for the Plaintiff

M Msomi

Second Defendant representing himself.

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