

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Hartley and Others (33944/2022) [2024] ZAGPPHC 245 (19 March 2024) [2024] ZAGPPHC 245

COURT

North Gauteng High Court, Pretoria

BEFORE

RJ Groenewald

CASE / FILE NUMBER

33944/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 33944/2022

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED: YES / NO

DATE:

19 March 2024

SIGNATURE:

In

the matter between: NEDBANK
LIMITED
Applicant
and
DANE
MICHAEL HARTLEY
1st Respondent
(ID
8[...])
JOHN
COLIN HARLTEY
2nd Respondent
(ID
4[...]
SA
HOME LOANS (PTY) LTD
3rd Respondent
(REG
NUMBER: 2006/035436/07)
THE
STANDARD BANK OF SOUTH AFRICA LIMITED
4th Respondent
(REG.NUMBER:
1962/000738/06)
CITY
OF TSHHWANE METROPOLITAN MUNICIPALITY
5th Respondent
NEUPER
LESLEY ANN
6th Respondent

Coram: Groenewald, RJ (AJ)
Heard

on: 12 March 2024

Delivered: 19 March 2023 - This judgment was
handed down electronically uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

1. This is an application launched by the Applicant, being the Plaintiff in the Main Action under case number 28772/2017, seeking an order declaring the immovable properties of the First Respondent specifically executable in terms of the provisions of Uniform Rule of Court 46(1) and Rule 46A.

2. On 22 May 2019 judgment was granted, jointly and severally, the one paying the other to be absolved, against the First and Second Respondents herein being the Defendants in the Main Action.

3. In terms of the judgment, the Defendants were ordered to:

In respect of Claim A:

3.1. Make payment in the amount of R149 188.59;

3.2. Interest on the aforesaid amount at 20.75% per annum, calculated from 19 March 2019, to date of final payment, both days inclusive;

In respect of Claim B:

3.3. Payment of the amount of R561 232.43;

3.4. Interest on the aforesaid amount at 11.25% per annum, calculated from 19 March 2019, to the date of final payment, both days inclusive;

3.5. Cost of suit in the sum of R200 plus Sheriff fees.

4. The First Respondent is the registered owner of Erf 641 Muckleneuk, Bailys Muckleneuk, with physical address at 7[...] N[...] Street, Muckleneuk, Pretoria, Gauteng Province (“the first property”) and is also the joint registered owner of and reside at Erf 3687 Garsfontein, Extension 13, with physical address at 9[...] M[...] Street, Garsfontein, Extension 13, Pretoria, Gauteng province (“the second property”).

5. The second property is the primary residence of the First Respondent and his wife, the Sixth Respondent. The first property is occupied by the First Respondent’s parents.

6. The relief sought in the present application relates to the first immovable property of the First Respondent and the First Respondent’s 50% share in the second property. No relief was sought against the Second to Sixth Respondents save in the event of opposition, in which case costs were sought. The Third and Fourth Respondents have been joined in their capacity as bond holders. The Sixth Respondent is married to the First Respondent out of community of property. The Sixth Respondent holds the remaining 50% share in the second property.

7. The Fifth Respondent is joined as the local authority wherein the respective properties are located.

8. The First, Second and Sixth Respondents delivered a notice of intention to oppose the application and they were represented in argument by Adv Thlari, albeit that he did not prepare the heads of argument filed on behalf of the Respondents.

9. It is not at issue that this Honourable Court has the necessary jurisdiction to hear and entertain this application. The initial money judgment was granted by this Court on 22 May 2019.

10. The order in the Action was granted against the First and Second

Respondents in their capacities as sureties and co-principal debtors.

11. Pursuant to the aforesaid judgment, the Applicants caused writs to be issued and served against the moveable property of the First Respondent, and at the first property occupied by the First

Respondent's parents to recover the balance due in respect of the judgment. It suffices to state that irrespective of the attempts to execute on the judgment, the judgment remains unsatisfied.

12. Although the judgment was granted under case number 28772/2019,

peculiarly the Applicant proceeded to launch a first application, not under the main case number, but under a new case number 35073/2020

("the first application), seeking an order to declare the immovable properties of the First Respondent specially executable.

That application, according to the papers as the order does not state the reasons, postponed (albeit that it was stated in the Founding Affidavit on at least two occasions that it was dismissed), inter alia, as the court found that:

12.1. Not all interested parties had been joined to that application; and

12.2. That the application was premature as there was a pending rescission application.

13. The order by Mr Justice Fourie, referred to above, in the first

application only reflects the first respondent (in this application) as a respondent in those proceedings. It therefore comes as no surprise that the issue of joinder, quite correctly in my view, was raised by that court. The order provides for the postponement of the first application pending the finalisation of the rescission application under case number 28772/2019 and the Applicant was ordered to pay the wasted cost. The fact that non-joinder was raised is not unimportant and I shall return to this issue later in this judgment.

14. The first application was withdrawn the day prior to the hearing of this application on 12 March 2024. Mr Thlari argued that the first application was not properly withdrawn, in other word without either the Respondents consent, or with the leave of Court, and consequently that the first application therefore remains intact. On that premise, so the argument went, the point raised based on *lis alibi pendens* remains good. As the matter stands the first application was postponed sine die and has not been set down. Uniform Rule 41(1)(a) provides that:

“A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.” (Own emphasis.)

15. The first application has not yet been set down and the withdrawal

thereof was competent. The withdrawal also has the effect of rendering the defence premised on *lis alibi pendens* moot.

The rescission application:

16. It is common cause that a rescission application was launched.

Ultimately, Tlhapi J gave a written judgment on 19 March 2021 dealing extensively with the merits of that rescission application,

ultimately granting an order that “The application is dismissed with cost” (“the dismissal order”).

17. The Respondents contend that the rescission application, albeit that they concede that the judgment was handed down, was not finalised. In support of this contention the Respondents attached an email ostensibly from the secretary of the Honourable Madam Justice Tlhapi, stating as follows:

“Dear All,

Kindly be advised that I recall the judgment that I sent on 19 March 2021, and the parties are NEDBANK VS DANIE MICHAEL HARTLY + ONE. CASE NO. 28772/19.

It has come to the judge’s attention that though the parties are correct the contents of the judgment thereof are irrelevant to the parties.

I sincerely apologise for the inconvenience caused by the judgment sent

Hope you find the above in order.

Regards

MARIA MONARENG

SECRETARY TO THE HONOURABLE MADAM JUSTICE TLHAPI.”

18. The Applicant having been, understandable so, caught off guard by the purported email from the Judge’s Registrar made inquiries to the office of the Deputy Judge President to establish what the correct position was. The inquiries were dealt with in a supplementary affidavit. The central factual allegations do not appear to be in dispute.

19. These inquiries resulted in a meeting between the legal representatives of the Applicant and the Deputy Judge President during which meeting a copy of an internal memorandum addressed by the Chief Registrar (Gauteng Division, High Court Pretoria), MST R Ledwaba was provided to the Applicant's representatives.

20. Considering the unusual nature of this matter it is deemed prudent to quote the essential contents of that internal memorandum:

"1. The letter from Baloyi Swart and Associates Inc dated 18 August 2023 refers.

2. After thorough perusal of the matter and the Caselines files, I have reached the conclusion that this matter should be referred to the Forensic Unit and the SAPS for a criminal investigation.

3. The letter that was uploaded that prevent the Applicant from proceeding with the execution of the order.

4. The following are the reasons I am of that view:

- The emblem used is not that is (sic) utilised by the Judiciary Officials

- The letter is unsigned

- The Judge's Secretary has no authority to recall a Judgment, said letter should be issued and signed by Judge

- The letter was uploaded by the Advocate and not the Secretary, to which all correspondence coming from the Judge's office should

be upload by the Judge's Secretary

- There is no indication of how the letter was sent out and thus leaves a lot of uncertainty as to the authenticity of the letter

5. It is therefore my recommendation that this matter be forwarded for further investigation.

6. I would further advise that Baloyi Swart approach the South African Police Services for further investigation. A letter can be prepared from my office confirming the letter to be fraudulent.

7. I trust the above will be in order."

21. The letter was signed by Ms TR Ledwaba, Chief Registrar, Gauteng

Division High Court Pretoria and dated 24 August 2024. I raised the authenticity of the internal memorandum with the office of the Registrar, and they confirmed that the memorandum is in fact authentic.

22. One of the central issues raised by the Respondents in opposition to the application is that the rescission application has not been finalised insofar as the order was recalled by the Judge's

Registrar. To this date:

22.1. the Respondents could not provide and have not attached to their papers any subsequent order issued by the Honourable Madam Justice Tlhapi or any High Court Judge that the dismissal order was recalled;

22.2. there is no appeal pending against the order by Tlhapi J; and

22.3. there is no application seeking the rescission of the order by Tlhapi J.

23. It is necessary to consider the nature of court orders at this stage:

24. Respect for the role and authority of the courts is founded on the Rule of Law.[1] The Constitutional Court in Pheko[2] explained it thus:

"The Rule of Law, a foundational value of the Constitution, requires the dignity and the authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner with the functioning of the court. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

25. The general, well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The

reasons

are twofold: first, the court becomes *functus officio* and its authority over the subject matter ceases; secondly, the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end.

26. An order of a court of law stands until set aside by a court of competent jurisdiction. In *Munsamy and Another v Astron Energy (Pty) Ltd and Others* 2022 (4) SA 267 (GJ) it was reconfirmed that the courts, in respect of administrative and executive decisions, have consistently held that such decisions are 'legally effective' until set aside and (at par 47) a court order is therefore presumed to be valid and correct (save in the event of a nullity) until it is set aside.
27. The apex court held in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) at par 59 that:

“[59] It cannot be gainsaid that orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. This, in addition to typifying common sense, the Constitution itself enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the judiciary is an imperative.”

28. Until set aside, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct. An invalid order must be obeyed until set aside, but an order given where the court has no jurisdiction is a nullity.
29. There is no suggestion that the dismissal order by Tlhapi J was a nullity. The necessary implication is that the order by Tlhapi J stands until it is set aside by a court of law. A Registrar, whilst he or she fulfils an important role in assisting the operation of courts, does not have the authority to recall a court order. Any attempt to do so would simply be void and invalid.

30. Ultimately, the above finding strikes directly on the Respondents’

attempt to contend that the initial money judgment granted was wrong. Those points have already been adjudicated upon, and this court is bound by the existing order. The same applies in respect of the order by Tlhapi J. The complaints or ‘defences’ against the Applicant’s initial claim cannot serve as a valid defence to the present application. The judgment stands and the Applicant is fully entitled to rely thereupon in the present application.

31. It is a matter of res judicata and it would neither be proper nor prudent for this court to try to second guess the preceding orders. The exceptio rei judicata is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. The

presumption is founded on public policy which requires that litigation should not be endless and on the requirement of good faith, which does not permit of the same things being demanded more than once.[3]

32. Therefore, the contention that the rescission application is an obstacle in the way of this application is without any merit and stands to be rejected. In the Respondent’s heads of argument, it was submitted that the existence of a rescission application automatically suspends the operation of a money judgment.

In the present matter this is not correct for several reasons, inter alia, the following:

- 32.1. As I have already held there is no longer a rescission application pending. That matter came to an end when Tlhapi J granted the order dismissing that application; and even if this was not so

32.2. It was made clear in the decision of *Erstwhile Tenants of Williston Court and others v Lewray Investments (Pty) Limited* and another 2016 (6) SA 466 (GJ) that it is doubtful that there was a common law rule to the effect that a rescission application would automatically suspend a judgment and that in consequence of the provisions of section 18 of the Superior Courts Act, 10 of 2013, judgments are not automatically suspended when a rescission application is launched.

33. The Respondents further contended that the fact that a previous

application, seeking an order in terms of Rule 46 read with 46A, on similar grounds, albeit whilst the rescission application was pending, was 'dismissed' (it was not dismissed – it was postponed sine die) has the effect that this matter is now *lis pendens* and in the alternative, that the point is *res judicata*. The application was not dismissed, it was postponed sine die – both counsel on behalf of the Applicant and on behalf of the Respondents upon being questioned in this regard, conceded that the first application was not dismissed. There was no final decision on the merits of the first application. The issue has been overtaken by the withdrawal of the first application the day prior to the hearing of this application.

34. It is peculiar that the Applicant launched an initial application

under a separate case number to the Main Action where the judgment was granted, and then again launched a second application, this time under the above case number, being case number 33944/2022 and not under the case number in the action. I have no doubt that as a matter of procedure, such as this, such a procedural deviation can be condoned by the court. This type of practice however should be avoided and any conduct which has the effect of unnecessarily escalation legal costs is to be disparaged. An application in terms of Rule 46 and 46A is generally one brought pursuant to the main proceedings, and as a general principle it is appropriate that the same case number, as used where the judgement was obtained, should be used. The situation may differ where the subject property falls within the jurisdiction of another court. However, to suggest that this would be an absolute bar to granting relief under a separate case number would however put form over substance.

35. Insofar as the Respondents contend or raise the defence of *lis pendens*, that defence cannot succeed. It has already been held that the order by Tlhapi J dismissing the rescission application stands until it has been set aside by a court of law. In addition, the first application launched under case number 35073/2020 came to an end when it was withdrawn. Even if the first application was not finalised, a defence of *lis alibi pendens* is not an absolute defence. A court retains the discretion to, despite all the elements being present, based on considerations of balance of convenience and equity to allow the second case to proceed.

36. The Respondents further contended that they were only sureties, and that the Applicant should first have claimed against the principal debtor (which the Respondents concede in their papers has been liquidated) before seeking judgment against them. The money judgement has deposed of this point, and it cannot at this stage serve as a tenable defence to this application. The Respondents ignore that their contractual liability was as co-principal debtors. There is no merit in this point.

The non-service on the bondholder:

37. Mr Thlari pointed out that in respect of Standard Bank, the Fourth Respondent and bondholder over the first property, the return is one of non-service by the Sheriff. Mr Steyn on behalf of the Applicant, in reply, conceded that there had not been proper service on Standard Bank. Concern was raised in this regard especially where Fourie J in the first application specifically raised the joinder issue which apparently led to the launching of the present application and the citing of the Second to Sixth Respondents, in contrast to only the judgment debtor being cited as a single respondent in the first application.
38. Mr Steyn contended that Standard Bank is a secured debtor and that it would suffer no prejudice if the order was granted and that it should be accepted that Standard Bank would not have anything to say about the application. This submission cannot carry the day. The Applicant did not address the provisions of Uniform Rule 46A(3)(b) which expressly provides that:

“(3) Every notice of application to declare residential immovable property executable shall be —

...

- (b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;” (Own emphasis.)

39. Rule 46(5)(a) pertinently provides that:

“(5) Subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless —

- (a) the execution creditor has caused notice of the intended sale to be served upon —
(i) preferent creditors;” (Own emphasis.)

40. Standard Bank is the bondholder and therefore a preferent creditor in respect of the first property – there is no doubt that Standard Bank should have received notice of this application. No case is made in the Founding Affidavit for condoning the non-compliance and mere lip service to the provision of the Rule would undermine the true purpose of the rule.

41. The Applicant has not complied with the above provisions in respect of the first property and the court is disinclined to grant the relief sought in respect of that property on the facts presented. Should the Applicant wish to seek an order in the future declaring the first property specially executable it should launch a new application, properly dealing with the merits of that application, containing updated information in respect of the value as required by the Rule, a copy of this judgment (in so far as it may also have a bearing on the costs order in that application) should be attached thereto and proper service should occur on interested parties. The Applicant has been previously called to order by Fourie J dealing with the need to serve on interest parties and should have headed the warning.

The position in respect of the second property:

42. The court considered all of the facts set out in the founding affidavit, specifically also the various attempts to seek execution of the judgment debt, as well as the facts set out in the answering and replying affidavits.
43. 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 subrule. This means 'legally relevant circumstances'.^[4]
44. In *Jaftha v Schoeman; Van Rooyen v Stoltz* [2004] ZACC 25; 2005 (2) SA 140 (CC) at 161I–163B the Constitutional Court gave the following examples of such circumstances:
- 44.1. whether the rules of court have been complied with;
 - 44.2. whether there are other reasonable ways in which the judgment debt can be paid;
 - 44.3. whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;
 - 44.4. the circumstances in which the judgment debt was incurred;
 - 44.5. attempts made by the judgment debtor to pay off the debt;
 - 44.6. the financial position of the parties;
 - 44.7. the amount of the judgment debt;
 - 44.8. whether the judgment debtor is employed or has a source of income to pay off the debt; and
 - 44.9. any other factors relevant to the particular case.
45. The Respondents presents no alternative proposal or plan to satisfy the judgment debt. Mindful that, as was held inter alia, in the case of *NPGS Protection and Security Services CC and another v First Rand Bank* 2020 (1) SA 494 (SCA) at par. 55 that:

“From this review of the relevant jurisprudence, it is clear that in a case of an application for default judgment, a court, in its discretion, needs to ensure that it is possessed with adequate information to enable it to grant a remedy which complies with these requirements. In the case of an application for summary judgment, provided the creditor has complied with the requirements of Rule 46(A), there is an onus on the debtor, at the very least, to provide the court with information concerning whether the property is his or her personal residence, whether it is a primary residence, whether there are other means available to discharge the debt and whether there is a disproportionate personality between the execution and other possible means to exact payment of the judgment debt.”

46. Whilst on the one hand the Respondents raise concern in respect of their family members, on the other, they present no primary facts which would suggest an alternative means by which the judgment debt can be satisfied. It is also clear from the writs of execution and the returns of service in respect thereof that the Respondents have made no attempt to satisfy the judgement or to take any steps of their own to mobilise capital to do so. The Respondents took no steps to either seek the rescission of the dismissal order or to appeal it.

Conclusion

and costs:

47. Consequently, it is held that the Applicant has made out a case for the relief to be granted in so far as it relates to the second property. It was contended on behalf of the Applicant in the founding affidavit that no reserve price should be set in respect of the properties. Mr Steyn conceded that it would be proper that a reserve price be set – and proposed that the reserve price should be equal to the estimate high value projected in the Lightstone Valuation, namely in respect of the second property being R2 810 000.00. The First Respondent holds a 50% share in the property which would amount to R1 405 000.00
48. The Respondents presented no primary facts to suggest what an appropriate reserve price should be. The proposed reserve price by Mr Steyn appears to be appropriate. Should that price not be obtained the Applicant will be entitled to seek a reconsideration thereof in terms of Rule 46A(9)(c). In that event updated facts in respect of the current value of the property should be presented.
49. In respect of the issue of cost, the Applicant seeks a cost order as between attorney and client. I am not convinced that there are grounds to grant such a cost order. Albeit, that the Applicant is only successful in respect of the order relating to the second property, it has been substantially successful and therefore the costs should follow the event,

Order:

50. Accordingly, the following order is made:

50.1. The 1st Respondent's 50% share in the immoveable property being, Erf 3687, Garsfontein, Extension 13, City of Tshwane in extent 1000 square meters held by Deed of Transfer Number T 6[...], situated at 9[...] M[...] Street, Garsfontein, Pretoria, is declared specially

executable.

50.2. A reserve price is set in respect of the sale of the 1st Respondent's 50% share in the above immovable property at R1 405 000.00.

50.3. The Registrar of the above Honourable Court is authorised to issue warrants of attachment against the aforesaid share in the above immovable property.

50.4. The Respondents are ordered to pay the costs of the application on the party and party scale.

RJ GROENEWALD (AJ)

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 March 2024.

For the Applicant: Adv W Steyn Instructed by: Baloyi Swart & Associates – Mr Herman De Roubaix
For the Respondents: Adv E Mhlari Instructed by: C Economou Attorney [Heads of argument: Adv N Riley]
Matter heard on: 12 March 2024 (Virtually via MS Teams)

Judgment

date: 19 March 2024

- [1] Director-General, Department of Rural Development and Land Reform, and Another v Mwelasee and Others 2019 (2) SA 81 (SCA) at par. 57.
- [2] Pheko and Others v Ekurhuleni City 2015 (5) SA 600 (CC), par.1.
- [3] African Farms & Townships Limited v Cape Town Municipality 1963 (2) SA 555 (A) at p. 564.
- [4] FirstRand Bank Ltd v Folscher and Another, and Similar Matters 2011 (4) SA 314 (GNP) at 330C–D; Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases 2011 (6) SA 111 (WCC) at 129C.

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