

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Lateral Support 102 CC and Others (193/2022) [2023] ZAMPMBHC 34 (7 June 2023) [2023] ZAMPMBHC 34

COURT

Mbombela High Court, Mpumalanga

BEFORE

Mashile

CASE / FILE NUMBER

193/2022

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 193/2022

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED: YES

07/06/2023

In the matter between:

NEDBANK LIMITED

Applicant

and

LATERAL SUPPORT 102 CC

First Respondent

DAVIES NORMAN MCHULU

Second Respondent

SKOMBISO JENNIFER MCHULU

Third Respondent

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] In a claim emanating from the First Respondents' failure to service its banking facilities with the Applicant, this Court per Ratshibvumo J granted summary judgment on 20 June 2022 against the Respondents. Following the judgment, the Applicant launched this application, which is in terms of Rule 46(1)(a)(ii) and Rule 46A of the Uniform Rules of Court ("the Rules"). The application seeks to have the immovable property of the First and Second Respondents, over which the Applicant has registered a mortgage bond in the sum of R1 500 000.00, declared especially executable and for the issuing of a warrant of execution respectively. The Application is opposed by the Respondents.

[2] The immovable property sought to be declared especially executable and over which it is prayed a warrant of execution should be authorised and issued is described as:

Erf 3[...] W[...] F[...] Country Estate Township, Registration Division J.U.; Province of Mpumalanga, Measuring 1, 4423 (ONE COMMA FOUR FOUR TWO THREE) Hectares, Held by Deed of Transfer Number T[...]("the property").

[3] Additionally, the Applicant seeks an order in terms of Rule 46A determining whether or not the property shall be sold in execution without a reserve price alternatively, with a reserve price fixed by the Court.

FACTUAL BACKGROUND

[4] Despite the factual matrix being largely a matter of common cause, a terse description is nonetheless central to place the outcome hereof in its proper perspective. On 1 July 2020, the Applicant and the First Respondent concluded a banking Facilities agreement ("the agreement"). As security for the agreement, the 2nd & 3rd Respondents entered into unlimited suretyship and provided a covering mortgage bond over the property in the sum of R1 500 000.00. The First Respondent failed to service the agreement in consequence of which legal proceedings were instituted for the recovery of the amount due. Ultimately, the Applicant obtained a monetary judgment on 20 June 2022 against the Respondents.

- [5] Attempts to settle the amount owed to the Applicant were made but negotiations either collapsed or, where successful, the Respondents defaulted again resulting in failure to pay the Applicant. Prior to this application, the Applicant first attached the Respondents' movable assets. These efforts were in vain as the value of the movable assets attached amounted in all to approximately R57 500.00, which then fell far below the amount required to settle the amount that was due at the time.

ASERTIONS ADVANCED BY THE PARTIES

- [6] The Respondents have argued that the Rule 46 application does not comply with the requirements of its nature. The Second Respondent, the deponent to the founding affidavit, adds that he does not remember signing Annexure "A", the agreement, at the time and place indicated. The amounts of the indebtedness and claims have been highly inflated.
- [7] The Respondents assert that the municipal valuation is irrelevant and that the market evaluation is at R9 000 000.00. The Applicant's objective in launching these proceedings, they say, is its insatiable yearn to lay its hands on the property at all costs. The reserve price ought to be set at 70% of the market value for there to be fairness and justice. Additionally, the disparity between the debt and the value of the property is so vast that it renders the former inconsequential. As such, the Applicant should not be countenanced to proceed with this application in terms of Rule 46A.
- [8] The Applicant contends that case authority expects it to have complied with the following, which it submitted it has, to the extent possible, prior to launching this kind of application:

8.1 All the rules of this Court;

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

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

8.4 The circumstances in which the judgment debt was incurred;

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

8.6 The financial position of the parties;

8.7 The amount of the judgment debt;

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

8.9 Any other factors relevant to the particular case.

ISSUES

- [9] From the above, it is apparent that this Court is expected to determine whether the Applicant has made a case entitling it to the relief it seeks. Has the Applicant addressed all the factors arising in the cases of *Gundwana v Steko Development CC and Others*[1], put differently, has the Respondent made a case that will enable this Court to decline the relief that the Applicant seeks?

LEGAL FRAMEWORK AND APPLICATION

- [10] The starting point should be the citation of Rule 46(1)(a)(ii) and 46(a). In the order listed aforesaid, these Rules provide:

“46. Execution — immovable property. — (1) (a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless—

- (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or
- (ii) such immovable property has been declared to be especially executable by the court or where judgment is granted by the registrar under rule 31 (5).” And

“46A. Execution against residential immovable property. — (1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

- (2) (a) A court considering an application under this rule must—
 - (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
 - (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.
 - (b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered relevant factors, considers that execution against such property is warranted.
 - (c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.”
- [11] Prior to proceeding with this application for especially declaring the property of the Second and Third Respondent especially executable, it is apparent that the Applicant has adhered to the provisions of the rules of this Court governing the procedure. It is also not the case of the Respondents that proper procedure was not followed.

- [12] Attempt at settling the debt were made but have not been successful as the Second and Third Respondents simply and probably because of lack of funds, did not pay resulting in the Applicant embarking on foreclosure of the property. It is reasonable to state that there does not seem to be other ways in which the debt can be settled without following this current route. It is necessary to add that prior to launching this application, an attempt to execute on movable was made but the amount that could be realised came far below the amount owed by the Respondents.
- [13] It is difficult to assess disproportionality in this instance because this Court know very little about the financial positions of the Second and Third Respondents. For example, the Court is in the dark on whether or not the Respondents own other properties that they can sell to liquidate their indebtedness to the Applicant. All that is clear is that other than the current mortgage bond, there is no other encumbrance over it. Since the market value of the property is around R9 000 000.00, the equity in it is fairly substantial, which may help the Second and Third Respondents to realise a considerable amount with which to start afresh somewhere were they to agree to sell it.
- [14] The debt is the result of a pure commercial transaction between the First Respondent and the Applicant entering into a banking facilities agreement. The Second and Third Respondents stood surety in their personal capacity for the amount advance to the First Respondent. They further allowed the Applicant to register a mortgage bond to secure its loan against their property. The First Respondent's failure to observe the terms of the mortgage bond, has led to the Applicant relying on the suretyships and the mortgage bond to foreclose on the property to recover what is due and payable to it.
- [15] The Respondents have made various attempts to liquidate the amount due. These attempts have not been successful and they remain indebted to the Applicant in an amount almost equal to that which was due at the time of the launching of this application.
- [16] This Court was advised on the date of hearing of this matter that the Second Respondent is an admitted attorney of this Court practicing in its area of jurisdiction. That said, this Court has no information on his income and whether or not such earnings will be sufficient to settle the amount owed. Considering the period for which the amount has been due and payable and the several attempts made to discharge the liability, it would seem that the inference that the Second and Third Respondents do not have the financial capacity to settle the debt is unavoidable. This is notwithstanding the fact that the Second Respondent is a practicing attorney.
- [17] The combined outcome of the decisions in *FirstRand Limited v Folscher and another*[2], *Jafta v Schoeman and Others* [3] and *Absa Bank Limited v Mokebe*

[4] is the list of factors that a Court may have to consider when weighing up whether or not to authorise the issuing of a warrant of execution. These are the following but the Court was quick to point out that the list is not exhaustive and that each case will have to be decided on its own peculiar circumstances:

17.1 The arrears on the date default judgment is sought;

17.2 The total amount owing in respect of which execution is sought;

17.3 The debtor's payment history;

17.4 The relative financial strength of the creditor and the debtor;

17.5 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;

17.6 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;

17.7 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;

17.8 The debtor's reaction to such notice, if any;

17.9 The period of time that elapsed between delivery of such notice and the institution of action;

17.10 Whether the property sought to have declared executable was acquired by means of, or with the aid of, a State subsidy;

17.11 Whether the property is occupied or not;

17.12 Whether the property is in fact occupied by the debtor;

17.13 Whether the immovable property was acquired with monies advanced by the creditor or not;

17.14 Whether the debtor will lose access to housing as a result of execution being levied against his home;

17.15 Whether there is any indication that the creditor has instituted action with an ulterior motive or not;

17.16 The position of the debtor's dependents and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

[18] In Folscher *supra*, the Court stated that the circumstances applicable to the debtor must not be considered in isolation from the interests that the creditor has invested in the matter. Against that background, the court said at paragraph 38:

"[38] Turning then to the issues that have to be weighed up when a writ of execution against bonded property is sought, the creditor's position must first be considered in its proper context. The creditor has entered into an agreement with the debtor that both parties concluded voluntarily to enable the debtor to acquire the immovable property or gain access to capital against the security of the bond registered over the property. As emphasised in Saunderson at paragraphs

[2] and [3]:

"[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root and penetrates the rights of ownership, for the bondholder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms."

ARREARS ON THE DATE DEFAULT JUDGEMENT IS SOUGHT

[19] The banking facilities agreement provides that the nature and amount of the Respondents' indebtedness to the Applicant in terms of the banking facilities agreement, as well as the annual finance rate payable in respect thereof, will at any time be determined and proved by written certificate purporting to have been signed by a Manager or Accountant for the time being of any branch or the Head Office of the Bank, whose capacity or authority it will not be necessary to prove,

which certificate will upon the mere production thereof be binding on the Respondents and be prima facie proof of the contents of such certificate and of the fact that such amount is due and payable in any legal proceedings against the Respondents, and will be valid as a liquid document against the Respondents in any competent Court.

[20] It was against the strength of the provision of the abovementioned clause that the Applicant issued certificates of balance at various stages beginning with the date of summons to date of this application. The amount owed when the summons was issued on 7 October 2021 was R447 008.11 with interest at 17.50% (Prime plus 10.50) per annum, compounded daily and capitalized monthly from 08 October 2021 to date of final payment (both days inclusive). The Applicant issued a further certificate of balance after the date of issue of summons. The certificate is dated 30 March 2022 and reflects the amount owed as having swelled to R471 535.08.

- [21] The amount of R7 000.00 claimed by the Applicant to have been the last amount paid by the Respondents on 21 December 2021 was proved to be incorrect. In fact, the last correct payment by the Respondents was an amount of R150 000.00 but because of defaults the current amount owing remains around R450 000.00.

THE TOTAL AMOUNT OWING IN RESPECT OF WHICH EXECUTION IS SOUGHT

- [22] The amount for which execution is sought is approximately R450 000.00. The amount of R150 000.00 has had little impact because the Respondents failed to keep up their monthly payments. With interest, the amount has bounced back to almost where it was when the application was launched.

THE RESPONDENTS' PAYMENT HISTORY

- [23] The Respondents have been making intermittent payments. This, however, does not assist to bring down the amount owed significantly because there is no consistency. It would have helped a great deal had they been constant and steady with their monthly payments to the Applicant.

THE RELATIVE FINANCIAL STRENGTH OF THE APPLICANT AND THE RESPONDENTS

- [24] This Court is not in a position to assess the financial strengths of both parties. This is due to dearth of financial information from the Respondents. That said, it is apparent though that the Applicant is in a stronger financial position than the Respondents if their indebtedness to the Applicant is anything to determine this fact. This finding does not assist because the Court remains unable to assess whether or not the Second and Third Respondents will at any reasonable time be able to liquidate their indebtedness to the Applicant.

WHETHER ANY POSSIBILITIES EXIST THAT THE RESPONDENTS' LIABILITIES TO THE APPLICANT MAY BE LIQUIDATED WITHIN A REASONABLE PERIOD WITHOUT HAVING TO EXECUTE AGAINST THE RESPONDENTS' RESIDENCE

- [25] If the payment history of the Respondents is anything to determine this issue, the picture is gloomy. The litigation stretches back to 2021 and two years since, the amount currently owed is not radically different from what the Respondents owe now. Approaching this matter from this perspective therefore, the existence of the possibilities of the Respondents settling the amount due to the Applicant appears inaccessible. Moreover, shortly before commencement of proceedings on 2 May 2023, the Court gave the parties opportunity to engage on settlement negotiations. This proved in vain as both returned without a solution. This is exacerbated by the lack of the financial information of the Respondents, which is critical to decide this issue.

THE PROPORTIONALITY OF PREJUDICE THE APPLICANT MIGHT SUFFER IF EXECUTION WERE TO BE REFUSED COMPARED TO THE PREJUDICE THE RESPONDENTS WOULD SUFFER IF EXECUTION WENT AHEAD AND THE RESPONDENTS LOST THEIR HOME

- [26] This involves weighing up the likely prejudice that either side would suffer were the case to be decided against it. Again, this investigation cannot be conducted without the financial information of both parties. The Court is, however, aware that equity in the property is substantial because its market value is estimated at R9 000 000.00 and the Applicant is the only party that has an encumbrance over the property. This information, assuming that the approximation of the value of the property is correct, leaves almost equity of about R8 400 000.00.
- [27] The equity in the property is of little significance if it cannot be utilized to assist the First and Respondents to liquidate their debt against the Applicant. The only manner of unlocking the value is to sell the property and realise profit with which to begin afresh. If this is not done sooner, the financial position of the Second and Third Respondents may deepen and ultimately land them in a crisis, which is still avoidable. I say this mindful that the property is not only a residential home of the Second and Third Respondents but it has been modified to suit the needs of their physically disabled child.
- [28] If the Second and Third Respondents were to accept their position, they can sell and utilize the equity to start afresh, they could purchase or build another house with features that will accommodate their disabled child. On the other hand, the circumstances of the Respondents, as was stated in Folscher above, ought to be considered together with the interests of the Applicant in the matter. Tersely, the Applicant advanced the loan on the understanding that the Respondents would honour their obligations arising in terms of the agreement.
- [29] Thus, where they fail to live up to the terms of their agreement with the Applicant, the latter should ordinarily expect that it would be able to recover what it is owed by foreclosure, where circumstances are appropriate. Having had regard to what has been traversed above, it would seem that it there will be more prejudicial to delay settlement of the debt in circumstances where it has exhausted virtually all the steps necessary to recover it.
- [30] The personal circumstances of the Second and Third Respondents, without disclosure their financial circumstances, however grave, pale into insignificance. The reason for that is apparent – the Court is oblivious of the financial capability of the Respondents to secure another property in which they can continue to live with their disabled child. A thread that runs through all these is the lack of disclosure of the financial circumstances of the Respondents and this emphasizes how hamstrung the Court can be without such information.

WHETHER ANY NOTICE IN TERMS OF SECTION 129 OF THE NATIONAL CREDIT ACT, 34 OF 2005 WAS SENT TO THE RESPONDENTS PRIOR TO THE INSTITUTION OF ACTION

- [31] The Applicant has alleged that it has forwarded the notice even though the transaction is not one regulated by the provisions of the National Credit Act. This has not been contradicted by the Respondents. As such, it ought to be treated as admitted that the Applicant has indeed complied notwithstanding that it was not obliged to perform in terms of the said Act. I have

already stated that settlement negotiations, probably triggered by the initiation of legal processes to recover the amount owed, ensued but because the Respondents could not be consistent with their payments, the amount often vacillated and finally ballooned to where it is now.

THE PERIOD OF TIME THAT ELAPSED BETWEEN DELIVERY OF SUCH NOTICE AND THE INSTITUTION OF ACTION

[32] From annexures to the particulars of claim, it appears that the 129 Notice issued in terms of the National Credit Act was prepared and sent by registered mail to the domicilium citandi et executandi address of the Respondents on 4 November 2021. On 10 November 2021, the Second Respondent acknowledged his indebtedness and proposed an offer to settle. The Applicant requested the Second Respondent to acknowledge his indebtedness to it by signing an acknowledgment of debt but the latter refused. His undertaking to effect payment notwithstanding, he failed to pay. The period that had lapsed prior to the issue of the summons is approximately 68 days.

WHETHER THE PROPERTY SOUGHT TO HAVE DECLARED EXECUTABLE WAS ACQUIRED BY MEANS OF, OR WITH THE AID OF, A STATE SUBSIDY, IT IS OCCUPIED OR ACQUIRED WITH FINANCE OBTAINED FROM THE APPLICANT

[33] The property was not acquired by means of, or with, the assistance of a State subsidy. The property is a high value property over which a State subsidy would normally not apply. All indications are that the property is currently occupied by the Second Respondent, Third Respondents and their children, one of whom is disabled. It would appear that the property was privately acquired as the mortgage bond over the property is the only encumbrance recorded in the Deeds Registries Office System.

WHETHER THE RESPONDENTS WILL LOSE ACCESS TO HOUSING AS A RESULT OF EXECUTION BEING LEVIED AGAINST HIS HOME

[34] The property was not acquired by means of a State subsidy consequently it is not anticipated that the Respondents would lose access to State subsidy in case they subsequently wish to access it.

WHETHER THERE IS ANY INDICATION THAT THE APPLICANT HAS INSTITUTED THE ACTION WITH AN ULTERIOR MOTIVE OR NOT

[35] It is the Respondents' firm belief that the launching of this application has been inspired by the Applicant's unpeaceable desire to lay its hands on the Respondents' property. The allegation is not supported by any evidence. Absent such evidence, this Court has no choice but to accept that this application was prompted by the Applicant's desire to recover the debt owed to it by the Respondents. The bald allegation that the objective of this application was driven by the Applicant's wish to 'lay its hands on the property' must be rejected as bereft of any merit. In the result, it is fair and just that the property be declared especially executable and that a warrant of execution be authorised and issued.

WHETHER OR NOT TO SET A RESERVE PRICE FOR THE PROPERTY

- [36] The Applicant has specifically requested this Court not to set a reserve price as it will be in the interests of all concerned that the property be sold in execution at the highest possible price. The assertion of the highest price cannot be contradicted but the difficulty is what if the opposite happens – the property sells for far less than its value or, worse, even less than the Respondents owe to the Applicant. In the latter event, the Applicant will have a recourse to the Respondents to recover the shortfall whereas in the former, it will not suffer any loss.
- [37] The Respondents, on the other hand, will lose a lifetime investment if either scenario were to occur. The Respondents will thus, stand a better chance if a reserve price is set and only if all fails at the first auction that the property can be re-advertised and sold without a reserve price at the second auction. In view of the considerable equity in the property, which constitutes the disparity between the debt and the value of the property, approximately R9 000 000.00, it will be unjust and inequitable not to set a reserve price.
- [38] The Applicant's argument that it will ensure that its attorney or nominee attends the auction to protect the interest of both the Respondents and its own, simmers down to two sales. Firstly, the nominee can only protect such interest by purchasing the property back. Secondly, there will be a period to re-advertise the property and determining which offer is reasonable for acceptance. The Respondents will not have a say in the process because they will have lost ownership of the property to the Applicant. The costs occasioned by these processes will in all probabilities be borne by the Respondents.
- [39] The Applicant has urged this Court that, if it decides to set a reserve price, it must do so on the basis of the valuation of the Applicant, R9 000 000.00, less 50%. If the Court were to accept that approach, it should set the reserve price at R4 500 000.00. Conversely, the Respondents have asserted that having regard to the disproportionality between the debt and the market value of the property, it will only be fair and reasonable that the reserve price be set at the market price, R9 000 000.00, less 30%, which amounts to R6 300 000.00.
- [40] Considering that the Applicant may still have opportunity to sell this property without a reserve price, in case it is not purchased at the first auction, both amounts suggested by the parties seem extremely low and will be disadvantageous to the Respondents especially if successful and financially capable bidders turn up at the auction. For that reason, I am inclined not to adopt either proposal. In the opinion of this Court and having in mind that this property may still be re-advertised and sold for any amount, a fair and just reserve price should be the market price less 15%. In amount terms it is R7 650 000.00.

ORDER

[41] In the circumstances, the Court makes the following order:

1. The property is declared especially executable for the amount of R447 008.11 plus interest at 17.5% per annum, calculated from 8 October 2021 to date of final payment;

2. The Registrar of this Court is authorised and directed to issue a warrant of execution against the property;
3. The reserved price is determined at R7 650 000.00;
4. The Respondents are directed to pay the costs of the Applicant at the scale as between attorney and client.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 07 June 2023 at 10:00.

APPEARANCES:

Counsel for the Applicant: Adv Van den Berg Instructed by: Stegmanns Inc Counsel for the Respondents: Adv E Mkhawane Instructed by: Mculu Incorporated Attorneys Date of Judgment: 07 June 2023

[1] 2011 (3) SA 608 (CC),

[2] 2016 JOL 36728 (GNP)

[3] 2005 (2) SA 140 (CC)

[4]

(2018) JOL 40390 (GJ)

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