

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Nkosi (18884/2014) [2017] ZAGPPHC 900 (6 December 2017)

[2017] ZAGPPHC 900

COURT

North Gauteng High Court, Pretoria

BEFORE

Mbongwe

CASE / FILE NUMBER

18884/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 18884/2014

6/12/2017

In

the matter between:

NEDBANK
LIMITED Applicant
and
NTSIKELELO
KEITH
NKOSI Respondent
(Identity
No. ...)

JUDGEMENT

MBONGWE, AJ:

INTRODUCTION

[1] This is an unopposed application in terms of Rule 46(1) in which the applicant, seeking to recover a debt amounting to R130 450-47, has approached the court for an order declaring an immovable property co-owned by respondent and his wife to whom the respondent is married in community of property, specially executable. It is of paramount importance in this case to state that the immovable property sought to be attached is the primary residence of the respondent.

ISSUES

OF LAW

[2] The main issue is whether the respondent's primary residence can, on the basis the facts contained in applicant's founding affidavit, be justifiably declared specially executable. More specifically, the question is whether the applicant's case satisfies the provisions of rule 46(1) and the various court pronouncements relating to executions against a person's primary residence. These issues were

raised with applicant's counsel who persistently argued, despite the indication to the contrary by the court, that the applicant has made out a case and was, therefore, entitled to the relief sought. This resulted in counsel being requested to submit written heads of argument in support of his argument and submissions.

[3] Prior to referring to the provisions of rule 46(1) and precedent case law, I consider the facts disclosed in the applicant's founding affidavit and relied upon for the relief sought. Hereunder I deal firstly with those facts and thereafter, in paragraph 4, the written argument and submissions.

3.1 The core of the applicant's case is that the respondent does not reside in the residence sought to be attached, but resides with his mother at the latter's residence. It was at his mother's residence where the respondent was served with the writ of execution and a nulla bona return issued after the respondent had allegedly advised the sheriff of his inability to settle the debt of R130 450-00 in respect of which default judgement was granted by the registrar.

3.2 The applicant acknowledges that the property sought to be attached is the primary residence of the respondent. Why counsel could not accept that the rules and case law applicable to the attachment of such immovable have not been complied with in the applicant's founding papers is beyond me. Interestingly, however, counsel has attempted, in the written closing arguments, to augment the shortcomings in the founding papers, but appears to have missed the real concerns raised by the court regarding the applicant's non compliance with the law and legal principles

applicable in cases where the relief sought is concerned, namely, the attachment of a debtor's primary residence. Paragraph 3.13 of the written argument and submissions clearly relates to the concerns raised, but which have not been addressed in the founding papers.

3.3 The applicant makes heavy weather of the fact that the respondent does not reside at the property sought to be attached and that such property is encumbered in any event; a reference to a mortgage bond registered on the respondent's property allegedly in favour of ASSA. In *FNB Limited v Folscher & Another*, 2011 (4) SA court stated the following; "The court must be mindful in all matters that a judgment debtor facing execution and subsequent eviction should not be a victim of an abuse of the process, even though such would be rare in matters in which a specially hypothecated immovable property is the object of the execution process. The creditor's position must first be considered in its proper context." It is to be noted in the present case that the debt concerned does not originate from nor is it related to the respondent's purchase of the immovable property sought to be attached. The latter part of the applicant's argument consequently stands to be rejected for the reason that the respondent's property was never tendered as security for the debt concerned. For this reason and others I point out further in this judgment, the applicant's launching of this application amounts to an abuse of the process.

THE LAW

[4] It is trite that in motion proceedings an applicant has to set out its case in the founding affidavit. As pointed out in paragraph 3.2 above, reference is made in the written closing arguments to applicable precedent principles emanating from case law to augment

the shortcomings in the applicant's founding affidavit. Needless to state that the contents of the written closing argument and

submissions do not form part of nor do they constitute supplementary facts to the founding papers. The founding papers as they stand simply do not pass the muster when regard is had to the principles laid down in the in relevant cases referred to in the written argument and submissions.

[5] Noting the purported nulla bona return, which I deal with hereunder, and the course the applicant intended to follow as a result thereof, applicant's attorneys ought to have known that launching this application for the attachment of a debtor's primary residence on the basis of a default judgement issued by the registrar was stillborn as a judge then became an imperative player to consider and even seek all relevant facts before issuing an attachment order of a debtor's primary residence ; see the case of *Gundwana* referred to below.

[6] A further reason why it was an ill-conceived idea to launch this application is the applicant's non compliance with the provision of rule 46 (1) which read thus: " 46(1)(a) subject to the provisions of rule 46A, no writ of execution against the immovable

property of any judgment debtor shall be issued 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 immovable property sought to be attached is the primary residence of the judgment debtor, no writ shall be issued unless the court, having considered all the relevant circumstances, orders execution against such property.]"

[7] It is the law that a default judgment issued by the registrar in respect of a debt not related to the debtor's purchase of the

property sought to be attached should not solely be relied upon where the creditor will upon obtaining the default judgment seek direct execution against the debtor's primary residence; hence the proviso to rule 46(1). In my view, the registrar in this case could not have foreseen that the default judgment he granted could lead to this application, but the applicant's attorneys, on the other hand, ought to have been aware of the proviso to rule 46(1), especially the imperative involvement of the court as well as the requirements to be met. A mere reliance on the default judgment granted by the registrar in seeking an order for the attachment of a debtor's primary residence amounts to an abuse of process.

[8] In executing a writ against the movable assets of a debtor, the law requires that the sheriff satisfies himself that the debtor does not own movable assets of sufficient value to settle the debt. In the present case the sheriff's apparent acceptance, at the residence of the respondent's mother, and reliance on the respondent's alleged report that he did not own movable assets to satisfy the debt, does not, in my view, constitute compliance by the sheriff with his obligation to perform a due diligent search for the respondent's movable assets. Contrary to the submission made in the written submissions, paragraph 2.7 that "the sheriff was unable to locate any movable assets having performed a diligent search", I find that the sheriff could not have performed a diligent search at the residence of the respondent's mother, where the nulla bona return was issued nor at the primary residence of the respondent where he allegedly could not gain entry. I am, consequently not persuaded that the sheriff's issuance of the nulla bona return in the circumstances was in accordance with the rules and could be the basis for the launching of this application. I find, therefore, that the provisions of rule 46(1) have again not been complied with in this case.

[9] Further, on the papers before me, the applicant has no knowledge and is, therefore, still not in a position to inform the court who, in fact, is in occupation of the respondent's residence. By alleging that the respondent resides at his mother's house, but curiously being silent with regard to where the respondent's wife and co-owner of the residence sought to be attached resides and whether the couple has off-spring, inter alia, the applicant failed to disclose and address one of the crucial aspects to be considered by the court in deciding whether or not to grant an order for the relief sought. Granting this application in these circumstances

could possibly result in rendering a family headed by a woman homeless.

- [10] The repeated argument that the residence concerned is burdened anyway (an apparent reference to a mortgage bond registered on the respondent's property) is not only absurd, but can also hardly support the deprivation of the respondent and/or his wife of their primary residence in the circumstances of this case. So stringent is the law where an applicant seeks an order for the attachment of the primary residence of a debtor that much more than just the establishment of a debt is required. The disclosure of all relevant facts envisioned in the proviso to rule 46(1) and set out in various cases is a sine qua non to the consideration of whether or not to grant an order for the attachment of a debtor's primary residence. In fact the court is enjoined to mero motu canvass such facts; see, inter alia, *Gundwana v Steko Development CC & Others* [2011] ZACC 14 and *Standard Bank of South Africa Ltd v Saunderson*, 2006 (2) SA 264 (SCA).

BALANCE OF CONVENIENCE, JURISDICTION AND COSTS

- [11] A creditor seeking to attach a debtor's primary residence is required to show, inter alia, that there exists no less drastic measure to recover the debt. Having regard to the amount owed to it by the respondent, namely R130 450-00, a prudent creditor applicant would have sought to recover the debt in the magistrate's court where it is less expensive and a less drastic measure than the one sought in this case is available - (the procedure in section 65 of the Magistrate's Court Act, 1944). I find that the applicant's submission that it has no other way or less drastic measure to recover the debt is without merit and ought to be rejected.
- [12] In light of the findings in this judgment, I come to the conclusion that this application must fail. I can find no reason why the applicant should not pay the costs of this application.
- [13] I consequently make the following order;
1. The application is dismissed with costs.

M MBONGWE, AJ

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

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Prepared on 11 October 2026 · Esheria