

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Nkuna (2673/2020)

[2023] ZAMPMHC 39 (30 October 2023)

[2023] ZAMPMHC 39**COURT**

Middelburg High Court, Mpumalanga

BEFORE

Vukeya

CASE / FILE NUMBER

2673/2020

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****MPUMALANGA****DIVISION: MIDDELBURG LOCAL SEAT****CASE NO: 2673/2020****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED****DATE: 30/10/2023****SIGNATURE****In the matter between:**

NEDBANK
LIMITED
APPLICANT
AND
SELBY
SAMUEL NKUNA
RESPONDENT

JUDGMENT

Vukeya J

- [1] This is an application for an order declaring the property of the respondent described as ERF 1755 Tasbet Park Extension 3 Township, Registration Division JS, Province of Mpumalanga, Measuring 1000 (one thousand) square meters, held by deed of transfer number T[...], (“the subject property”) to be executable.
- [2] Nedbank (“the applicant”) is a public company duly incorporated in accordance with the company laws of the Republic of South Africa with its principal place of business at 1[...] R[...] Road Sandtown Sandton. According to the evidence of Di-Anne Qoto, the Recoveries Manager of the applicant, the applicant is the registered mortgagee over the subject property and a bond was registered as security for an overdraft facility agreement entered into between the applicant and the respondent.
- [3] Nkuna, (“the respondent”) is a male person with his chosen domicilium citandi et executandi at the subject property. He is sued in his capacity as surety for a juristic person called A Mark Innovations CC (“The CC”). The respondent signed a written deed of surety for the obligations of the CC on 30 October 2015 in which he bound himself as surety in solidum and co-principal debtor with the CC to the applicant for all known obligations and thereafter owing to the applicant.
- [4] The applicant instituted action against the CC during March 2015 in the Gauteng Division of the High Court in Pretoria for a sum of R3 239 962, 90 for monies lent and advanced to the CC. It obtained default judgment against it for the aforementioned amount together with interest at the rate of 9.25% from 1 January 2015 to date of payment.
- [5] A writ of execution was issued on the strength of the default order as the CC was unable to satisfy the judgment debt and costs in full or in part. The sheriff made an attachment on some of the CC’s goods. It was at that time that the respondent, the CC and Nkonyane concluded a settlement agreement with the applicant for the payment of the judgment debt in twelve instalments of R70 000, 00 per month starting from 1 December 2015 and R100 000, 00 per month from 1 December 2016 until the debt would have been discharged.
- [6] The CC paid ten, instead of twelve, instalments between 1 December 2015 and 1 December 2016 in breach of the terms of the agreement. The CC also failed to pay instalments in accordance with the agreement from January
2017. It paid a total of R1 100 000. 00 during the period 1 January 2017 to 8 August 2018 instead of instalments to the total of R2 000 000, 00 which were due to be paid during this period. It again failed to pay any instalment since August 2018

to date of this application, according to the applicant.

- [7] The applicant annexed to its founding affidavit a certificate of balance signed by its manager showing a balance of R 2 712 825, 29 owing to it by the respondent, together with interest on this amount at the rate of 7% per annum from 2 September 2020 to date of payment. It is on the basis of the above that the applicant applies

for an order to have the subject property of the respondent declared executable. The applicant also requests the court that in the event that it grants an order declaring that the property is executable, then it must set a reserve price against the sale in execution.

- [8] According to the application, an evaluation of the subject property was done and determined to be R 800 000, 00 and this was confirmed on affidavit by the valuator Ilzarie Douglas. The Municipal valuation of the property was determined to be R 820 000, 00. An amount of R 293 040, 41 was due and payable to the local municipality for rates and taxes during August 2020. The applicant proposed that a reserve price be set at an amount of R 600 000, 00 considering, amongst others, the value of the property, Sheriff's commission, outstanding rates and taxes and outstanding levies.
- [9] Nkuna stated in his answering affidavit that he is unemployed and does not believe he will secure employment any time soon because he is diabetic, has high blood pressure and suffers from kidney failure. He attends dialysis three times a week from 10h00 to 14h00. He avers that if the property is sold he and three other people who share the property with him will be left homeless. These people are also unemployed.
- [10] The version of the respondent is that he used to work for the CC (A Mark) and the sole member of the company was Jabulane Clement Nkonyane. During 2015 Nkonyane instructed him to deal with certain funds which had been paid into his banking account. Various trucks were purchased on behalf of the CC with funds incorrectly paid into its account. The applicant attempted to remove the trucks and other movable items while the respondent was at the business premises. He alleges that he was forced by the applicant's employees to sign a suretyship agreement, a consent to register a bond over his home and a settlement agreement. He states that he never personally used any of the funds erroneously received by the CC during 2015.
- [11] He avers that he was not given any other option but to sign the papers and was not allowed to seek legal advice. When the CC stopped trading, he became unemployed. According to Nkuna, the CC paid R70 000, 00 per month and eventually stopped. When the CC defaulted, the applicant obtained judgment against him. He contends that he was not aware that the settlement agreement had been made an order of the court and that the applicant should have taken action against the sole member of the CC and not him.

- [12] It is common cause that a settlement agreement which was made an order of the court was concluded between the applicant and the respondent on 18 October 2016. It is also common cause that the respondent bound himself as surety and co-principal debtor for the due and proper fulfilment of the CC's obligations to the applicant and bonded the property which is the subject matter of this application as security for the its obligations. It was not placed in dispute, however that this property is the primary residence of the respondent.
- [13] What is in dispute between the parties is the question whether the respondent's averment that the settlement agreement was concluded under duress has any relevance to the relief sought by the applicant and whether the respondent has been afforded the opportunity to be heard on the setting of the reserve price of the subject property and what the reserve price should be.
- [14] I will start with the consideration whether the averment that the settlement agreement was signed under duress by the respondent and whether such has any relevance to the relief sought by the applicant. Regarding this particular issue Counsel for the respondent argues that the applicant is not entitled to enforce the agreement which was obtained under duress. He relies on the decision in *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) at 343C wherein the court stated the following as the elements for establishing duress:
- "13.1. Actual violence or reasonable fear;*
- 13.2. The fear must be caused by the threat of some considerable evil to the party or his family;
- 13.3. It must be a threat of imminent or inevitable evil;
- 13.4. The threat or intimidation must be contra bone mores, and
- 13.5. The moral pressure used must have caused damage."
- [15] Counsel further refers to the case of *Freeman v Corporation of Maritzburg* 1882 NLR 117 at 123 in which the court stated that "the element of imminent or inevitable evil does not focus on the nature of the threat itself, but on the effect the threat had on the party." He submits that the respondent entered into the settlement agreement under duress and against his free will without the applicant having assessed his affordability to satisfy the agreement. This, according to Counsel, renders the settlement agreement unenforceable against him. It is Counsel for the respondent's submission that, the mere attempt to remove the trucks and other movable items of the company induced unlawful duress on the respondent to sign the documents against his will.
- [16] Counsel for the applicant argued that a party is bound by the agreements he makes and that a compromise is binding on the parties even when the original contract was invalid or even illegal or even when the contractual obligations are to its detriment. He relies on this argument to the case of *Theodosiou and Others v Schindlers Attorneys and Others* [2022] 2 All SA 256 (GJ). Also relying on the case of *Gollach & Gomperts (1978) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others* 1978 (1) SA 914 (A) to argue that "A party is not

entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise”

- [17] It is noticeable that the respondent does not disclose the nature of the alleged duress under which he was placed when he signed the agreement. It is also noticeable that even though the settlement agreement has been made an order of court, there has been no attempt by the respondent to have the order set aside on the basis of the fact that the agreement was signed under duress. Be that as it may, for the court to find whether the respondent’s averment that the settlement agreement was concluded under duress has any relevance to the relief sought by the applicant it has to rely on the evidence of the respondent explaining the nature and severity of the duress and also consider what steps were taken by the respondent to have the order making the settlement agreement an order of court set aside.
- [18] My view is that the respondent has not provided the court with sufficient evidence to conclude that he was under duress when he signed the settlement agreement. He does not even disclose what steps he has taken to get the actual debtors of the applicant to rescue him from the obligations he now faces as they may be aware of the fact that he had signed under duress. It is trite that a contract entered into under duress may be voided by the innocent party if it proves that there was a threat of considerable evil against it; that its fear was reasonable; that the threat was of an imminent or inevitable evil and induced fear to it; that the threat or intimidation was unlawful or contra bonos mores; and that the contract was concluded as a result of the duress. (See *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C)).
- [19] It is therefore my respectful view that the respondent has failed to prove all the above requirements to show that the settlement agreement which encompasses the suretyship agreement was obtained under duress. The respondent’s explanation that the mere attempt to remove the trucks and other movable items of the company induced unlawful duress on the respondent to sign the documents against his will is meaningless if unsubstantiated and it does not hold any water. I therefor find that the fact that the settlement agreement may have been signed under duress has no relevance to the application sought by the applicant.
- [20] The next question to answer is whether the respondent’s property should be declared especially executable and if so, what should be the reserve price. Rule 46A provides that:
- (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 all relevant factors, considers that execution against such property is warranted.

[21] The first and main consideration to be done in an application in terms of Rule 46A is the question whether the property the applicant seeks to declare executable is the primary residence of the respondent. In fact this question is what decides which procedure to follow when faced with the issue of making an order to execute against immovable property. It is clear from the papers filed in this application that the applicant, although it does not aver that the property is the primary residence of the respondent, it cannot dispute it. The respondent has averred that the property is its primary residence and that he shares it with three more people. As this particular aspect could not be disputed by the applicant and in the absence of any evidence to the contrary, I find that the property the applicant seeks to be declared executable is the primary residence of the respondent.

[22] Having found that the alleged duress has no relevance to the application before me, it follows that the settlement agreement as well as the suretyship agreements are binding to the respondent and therefore he remains indebted to the applicant, more so because he has not challenged the order making the settlement agreement an order of court. I proceed to determine whether there are alternative means by the respondent to satisfy the judgment other than execution. The respondent's defence is that he is unemployed and that he is a sickly man. The three people he shares the property with are also unemployed and it seems they only do piece jobs and only cater for meals for the household.

[23] In the respondent's own words, he does not believe he will secure employment any time soon because of his medical condition. He has also told the court in his answering affidavit that the procedures employed by the applicants to assist customers whose accounts are in distress is not applicable to him because he did not obtain the property through a loan provided by the applicant and therefore those mechanisms are not applicable to him. He states, however that even if those mechanisms were applicable to him, he would not be in a position to make payments. This has been made clear by the respondent that he is not in a position to make any payment to the applicant.

[24] The question is, before the court can declare the property of the respondent to be executable, what other means has the judgment debtor availed to the applicant to be considered as alternative means to satisfy the debt other than execution against the judgment debtor's primary residence. Rule 46A (2) (a) (ii) provides that it is the respondent who must have alternative means of satisfying the debt. In this case the respondent himself states that he does not believe that he will secure employment anytime soon to satisfy the debt and he does not suggest any other means with which he can satisfy the debt.

- [25] The respondent does not even mention that he has ever persuaded or that he intends to persuade the CC or its sole member to rescue his property, he is simply saying “I cannot afford it”. He is jointly indebted to the applicant with the CC and Mr Nkonyane. As can be seen from the papers, the CC was sued and judgment obtained against it. The Sheriff attended to the premises of the CC on 22 October 2015 and attached certain trucks in the presence of the sole member Mr Nkonyane. Subsequent to that, on 30 October 2015, the respondent and Nkonyane signed a settlement agreement in which they bound themselves as the sureties of the CC jointly and severally, the one to pay the other to be absolved. The respondent in the Covering Mortgage Bond registered against his name confirmed his indebtedness to the applicant “whether it be a direct or indirect liability incurred by the Mortgagor individually or jointly with others...”
- [26] Having signed as suretyship agreement and having signed a Covering Mortgage bond against his property, the respondent agreed to the process which would follow in the event of non-payment by the CC one of which was the sale in execution of this property. It is trite that a credit provider in agreements where the consumer has offered their property as security for a loan has the right to foreclose on the property, should the consumer fail to adhere to the rights and obligations contained in the said credit agreement, however, this right can only be exercised as a last resort. The purpose is to provide as much relief as possible to indebted consumers faced with the loss of their primary residences. (See *Nkatha v Firststrand Bank* 2016 (4) SA 257 (CC) and *ABSA Bank Limited v Mokebe* 2018 (6) SA 492 (GJ)).
- [27] What the applicant has asserted is that the CC has no assets available to attach and the judgment obtained turned out to be an ‘empty judgment’ as there are no unencumbered assets to satisfy the debt. Although according to Rule 46A (2) (a) (ii) the judgment debtor must have alternative means of satisfying the debt, the judgment creditor must also show that it has adopted creative means to recover the debt. My respectful view is therefore that the applicant has not provided the court with sufficient evidence to show that the judgment obtained against the CC was an ‘empty judgment’.
- [28] There is no proof of any efforts made to execute against any movable or immovable property of the CC and its sole member, Mr Nkonyane. A court dealing with an application of this nature, has a duty to carefully examine and investigate all relevant circumstances before granting an order to execute a primary residence of a person or a family. In this case, it is not clear why the CC and its sole member have not been pursued by the applicant in order to show that it adopted creative means to recover the debt from the three debtors.
- [29] I am in agreement with the view expressed by Vally J in his dissenting judgment in *Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014) where he remarked as follows: “In a case which involves the constitutional rights of persons, and where there is a real prospect of those rights being trampled upon, it is imperative that the Court examines very carefully the circumstances under which this occurs, failing which there is real danger of an injustice prevailing. There are therefore good grounds to deploy the inherent jurisdiction of the Court to avert such injustice”.

[30] The settlement agreement which was made an order of court mentions under clause 2, the list of documents serving as supporting securities to the Settlement Agreement amongst which is a “Deed of Suretyship by Jabulani Clement Nkonyane” and a “Notarial Bond over the Assets of A Mark Innovations CC”. My view is therefore that, there are other alternative means to recover the debt from the other debtors and executing on the property of the respondent is not a last resort and it is therefore unwarranted.

[31] In the result I make the following order:

31.1. The application is dismissed, with costs.

VUKEYA LD

JUDGE OF THE HIGH COURT

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