

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Vika (46/2018) [2022] ZAECHMHC 39 (27 September 2022)

[2022] ZAECHMHC 39

COURT

Eastern Cape High Court, Mthatha

BEFORE

J.E. Smith

CASE / FILE NUMBER

46/2018

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IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE DIVISION,
MTHATHA)

Case

No: 46/2018

In

the matter between:

NEDBANK
LIMITED
APPLICANT
And
NOZIBELE
VIKA
RESPONDENT

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.

JUDGMENT**SMITH J:**

- [1] The applicant seeks an order in terms of Uniform Court Rule 46 (A), declaring the respondent's primary resident executable.
- [2] The parties concluded a written loan agreement on 31 January 2008, in terms of which the applicant advanced to the respondent the sum of R598 000. The applicant then caused a mortgage bond to be registered against the respondent's immovable property for the capital sum of R101 480 and an additional sum of R26 000.
- [3] The respondent subsequently fell into arrears and on 4 April 2019, the court granted judgment against her for the payment of the sum of R100 577.82, together with interest and legal costs. The respondent has failed to satisfy the judgment debt and at the time of the launching on this application, the arrears amounted to R87 981.60, representing almost 61 monthly instalments.
- [4] The last payment made by the respondent at the time of the launching of the application was R777.74, which was paid on 1 December 2017. She has since only paid a further sum of R5000.
- [5] The current market value of the immovable property is R480 000. The respondent has estimated the value at R650 000.00, but has not provided any rational and objective basis for that valuation.
- [6] The municipal valuation as at 28 January 2021 was R124 000, and as at 28 February 2021, the respondent owed R27 462.39 in respect of municipal rates and taxes.
- [7] The respondent has declined to participate in the applicant's Assisted Sales Programme, which would have allowed her to sell the property at the best possible price. She would also have qualified for discount on the remaining balance and would have been allowed to pay off the remaining debt interest free.
- [8] At the time of concluding the loan agreement, the respondent was employed by a firm of attorneys and earned a gross salary in the sum of R13 200. She resigned that post in 2017 and took up employment with a firm of estate agents, where she was promised a basic salary of R15 000 per month, plus commission. The respondent claimed that the company, however, failed to honour their obligations and she consequently never received her salary. She, nevertheless, remained in their employment for four years until January 2021. Since then she has been working independently in the real estate industry.
- [9] The Respondent alleged that she would have alternative means to satisfy the debt from commissions in respect of four properties for which she had received mandates to sell. Once she receives the commission, she will be able to settle the debt in full. However, apart from the legal difficulties that arise from the fact that the respondent purports to be operating as

an estate agent without a fidelity fund certificate required in terms of the Estate Agency Affairs Act, 112 of 1976, it was not clear at the time of the hearing what had happened with regard to those sales and why, some months after the filing of the answering affidavits, she has apparently not received any commission.

[10] She also opposed the application on the basis that an execution order will infringe upon her constitutional rights to property and to access to adequate housing. Mr Pangwa, who appeared on her behalf, was constrained to concede that she had failed to show that she has alternative means to satisfy the debt or that her constitutional rights will be infringed if an execution order were granted. It is common cause that the respondent has voluntarily mortgaged her property as security for her obligations in terms of the loan agreement. In *Gudwana v Steko Development CC & Other* 2011

(3) SA 608 (cc), at paragraph 53-54, the Constitutional Court held that:

“It must be accepted that execution and itself is not an odious thing. It is part and parcel of economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attend the same purpose, that alarms bells start ringing. If there are no other proportionate means to attain the same and, execution may not be avoided.”

[11] Our courts have repeatedly emphasised that execution mechanisms must be effective to have legitimacy and public confidence in them should not be lightly disturbed. If the efficacy of the execution against mortgage bonds is undermined by courts refusing to declare property executable where a debtor clearly has no alternative means to satisfy the debt, it may serve to sequester the immovable property from creditors, thereby rendering it useless as a means to raise credit. The prejudicial consequences arising from such an approach, not only for banks but also for prospective homeowners, are self-evident. In *Jafta v Schoeman & Others, Van Rooyen v Stolts and Others* [2004] ZACC 25; 2005

(2) SA 140 (CC) the Constitutional Court held that:

“If the requirements of the rules have been applied with and there’s no other reasonable way by which the debt may be satisfy, an order authorising the sale and execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case should be grossly disproportionate.”

[13] Mr Pangwa has to his credit not attempted to his challenge these established legal principles, but has instead submitted that the court should use its discretion to allow the respondent reasonable time to pay the debt. He suggested that the court may, in exercising its judicial oversight function, suspend the operation of the execution order for a period so as to allow the respondent sufficient opportunity to pay off the debt.

[14] Mr Ramsay, who appeared for the applicant, submitted that such an order would not assist the respondent, since it is clear that she will not be able to acquire sufficient funds to satisfy the debt within a reasonable time. He submitted that the further delay would instead be prejudicial to her since it would only serve to run up interest. He argued that, in any event, the execution process would take a few months to be finalised, which will allow the respondent more than sufficient time to raise the necessary funds.

[15] I am mindful of the fact that the loss of her house will be a devastating financial blow to the respondent and one from which she may not recover. She appears to have been determined to save her home, although she was clearly unable to muster the financial means to do so. Assuming that as part of my judicial oversight roll I do have the power to suspend execution of the order for a period, I am not convinced that it will serve any purpose in the circumstances of this matter. The respondent has regrettably failed to provide any evidence that she will be in a position to raise the funds to settle the debt within a reasonable time. In these circumstances, it is unavoidable that an order authorising the sale and execution would be fair and appropriate.

[16] I am consequently satisfied that the applicant has made out a case for relief sought in the notice of motion.

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

17.1. The immovable property of the Respondent, more fully described as:

ERF [...] UMTATA TOWNSHIP EXTENSION NO 68 KING SABATA DALINYEBO MUNICIPALITY DISTRICT OF UMTATA, PROVINCE OF THE EASTERN CAPE IN EXTENT 400 (FOUR HUNDRED) SQUARE METRES HELD BY DEED OF TRANSFER NO. T1828/2000 SUBJECT TO THE CONDITIONS THEREIN CONTAINED;

is hereby declared executable.

17.2. A reserve price in respect of the sale in execution of the aforesaid immovable property is set at R240 000.00.

17.3. The respondent shall pay the applicant's costs of suit on the scale as between attorney and client.

J.E. SMITH

Judge of the High Court

APPEARANCES

Date of hearing

: 18 August 2022

Date of delivery

: 27 September 2022

Attorney for the Applicant : Adv. Ramsay

: Pagden Attorneys

C/o Smith Tabata Attorneys

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MTHATHA

Attorney for the Respondent : Mr. Pangwa

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Prepared on 13 October 2026 · Esheria