



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

Not reportable

CASE NO. 1600/2022

In the matter between:

NEDBANK LIMITED

Applicant

and

UMVOTI TRADERS 1006 CC

First respondent

SKHUMBUZO ATWELL ZUMA

Second respondent

JUDGMENT

LAING J

[1] This is an application for an order to declare executable the immovable property situated at 8 Canna Place, Blue Bend, East London ('the property'). The applicant also seeks the setting of a reserve price.

Background

[2] On 13 September 2017, the applicant and first respondent concluded a written home loan agreement. As security for its indebtedness, the first respondent arranged for the registration of a covering mortgage bond in the amount of R 3,125,000 and the hypothecation of the property. The first respondent breached the agreement. It owed the sum of R 2,697,213 at the time that the applicant launched the present application; the debt attracts considerable interest.¹ On 17 January 2023, the applicant obtained judgment against the first respondent and instructed the sheriff to attach. This resulted in a *nulla bona* return.

[3] For immediate purposes, the applicant set out the details required under rule 46A(5) of the Uniform Rules of Court ('URC'), indicating that the market value of the property was R 2,000,000 and the municipal value somewhat lower. It alleged that the first respondent owed an amount of R 22,390 for municipal rates and service charges and contended that a reserve price of R 1,047,000 would be appropriate. The applicant also stated that it had invited the first respondent to participate in its Nedbank Assisted Sales programme, in terms of which an owner agreed to the applicant's marketing and selling of his or her immovable property; if the property was sold, then the owner qualified for a discount on the amount still owed under the home loan agreement and could arrange for payment of the outstanding debt on favourable terms. The first respondent has, so far, declined to accept the invitation.

[4] The second respondent is the sole member of the first respondent. He alleged that the property was his primary residence and the home of his wife and three children. He also averred that he had requested the applicant to accept a proposal for settlement of the arrears on the strength of 'two lucrative contracts' that the first respondent had secured; he had paid an amount of R 21,886 on 27 February 2023 as an indication of his commitment to the proposal. The applicant had rejected it. The second respondent went on to state that he had found permanent employment as a project manager at the Khonzinkosi Spar, Tugela Ferry, earning a nett salary of R 45,020 per month; he was in a

¹ At the time that the application was brought, interest was charged at prime plus 1.11 %, which amounted to 12.36 % per annum.

better financial position than previously. He confirmed that the first respondent had no intention to accept the invitation to participate in the Nedbank Assisted Sales programme; it remained its intention, however, to settle the debt and to apply for the rescission of the judgment already obtained by the applicant.

Issues to be decided

[5] The main issue to be decided is whether the applicant has satisfied the requirements of rule 46A of the URC. More specifically, the court must determine whether the evidence provided by the applicant and the submissions made by the second respondent justify the relief sought.

[6] A brief overview of the relevant principles is set out below.

Legal framework

[7] In *Nedbank Ltd v Bestbier (Scholtz Intervening)*,² the court held that rule 46A provides for judicial oversight to ensure the protection of the constitutional right to adequate housing.³ Sub-rule (1) thereof stipulates that the rule applies whenever an execution creditor seeks to execute against the residential property of a judgment debtor.

[8] Prior to the introduction of rule 46A,⁴ the provisions of rule 46(1)(a) stipulated, *inter alia*, that no writ of execution against immovable property could be issued until a court had declared the property to be specially executable. The proviso to this was that where the property was the primary residence of the judgment debtor, the writ could not be

² Unreported, WCC case no. 12654/18, dated 17 September 2020.

³ At paragraphs [39]-[43]. The decision was confirmed on appeal in *Bestbier v Nedbank Ltd* (unreported, SCA case no. 150/2021, dated 13 June 2022).

⁴ Rule 46A came into operation 22 December 2017.

issued unless the court had considered 'all of the relevant circumstances' before ordering such execution.

[9] The Constitutional Court provided examples of such circumstances in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,⁵ which Van Loggerenberg summarised as follows:

- '(a) whether the rules of court have been complied with;
- (b) whether there are other reasonable ways in which the judgment debt can be paid;
- (c) whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;
- (d) the circumstances in which the judgment debt was incurred;
- (e) attempts made by the judgment debtor to pay off the debt;
- (f) the financial position of the parties;
- (g) the amount of the judgment debt;
- (h) whether the judgment debtor is employed or has a source of income to pay off the debt;
- (i) any other factors relevant to the case.'⁶

[10] The learned writer pointed out, with reference to *Gundwana v Steko Development*,⁷ that the Constitutional Court had added the following to the circumstances listed above:

'It is only when there is a disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to

⁵ 2005 (2) SA 140 (CC), at 161I-163B.

⁶ Van Loggerenberg, *Erasmus: Superior Court Practice* (vol 2, 2ed, Juta, service 5, 2017), at D1-631-2.

⁷ 2011 (3) SA 608 (CC), at 626F-G.

attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.’⁸

[11] The above principles constitute a rudimentary framework for the determination of the matter. This will be discussed in the paragraphs that follow.

Discussion

[12] As a starting point, it is necessary to emphasise that the sheriff’s attempt to execute the judgment by attachment of the first respondent’s movable assets resulted in a *nulla bona* return. In *Basson v Basson and Another*,⁹ Norman J observed that the effect of a *nulla bona* return was to alter the status of a debtor to that of an insolvent; it also resulted in the encroachment upon a debtor’s right not to be deprived of their property without due process. The learned judge went on to describe it as a ‘gateway’ to the debtor’s loss of his or her residential home.¹⁰

[13] In the present matter, the second respondent has relied extensively on the undisputed fact that the property is his primary residence and serves as a home for his wife and three children. He has also relied on the undisputed fact that he has found permanent employment as a project manager, earning a salary that would be sufficient to pay the first respondent’s arrears and to settle its debt without need for the sale of the property in execution. These are facts that must be considered.

[14] In *Changing Tides 17 (Pty) Ltd NO v Frasenbourg*,¹¹ however, Rogers J held that:

‘In making the rule 46A assessment, the prospect of the judgment debt being satisfied without recourse to the mortgaged property has to be investigated. If a debtor is

⁸ Van Loggerenberg, at D1-632.

⁹ (260/2019) [2022] ZAECMKHC 85 (25 October 2022).

¹⁰ At paragraph [39].

¹¹ 2020 JDR 1430 (WCC).

substantially in arrears and fails to place information before court pointing to the existence of other assets from which the indebtedness might be satisfied, a court would generally be justified in proceeding on the basis that execution against the mortgaged property is the only means of satisfying the mortgagee's claim.'¹²

[15] The court can only determine a matter based on the evidence placed before it. Rule 46A(5) enjoins the applicant to ensure that its application is supported by documents that deal with the aspects listed under sub-rules (a) to (f).¹³ Furthermore, rule 46A(6)(b)(ii) enjoins the respondent, when opposing the application, to set out the reasons for his or her opposition and the grounds upon which he or she opposes the relief sought. Provided that the applicant has made out a case for execution against the residential immovable property of the respondent, the court may, in the absence of evidence that there is any other satisfactory means by which to satisfy the judgment debt, order execution against the respondent's primary residence. The duty to place before the court such facts as might militate against such an order lies with the respondent. If the respondent fails to do so, then a court may indeed proceed on the basis that no acceptable alternatives are available.

[16] Returning to the present matter, the second respondent has not provided essential information regarding his personal circumstances. The ages of his children are unknown, his wife's employment status and income-earning capacity are unknown. From the salary advice attached to the second respondent's papers, it is apparent that he commenced employment at the Khonzinkosi Spar on 1 April 2022. Why he did not use his salary to settle the first respondent's arrears before the applicant obtained judgment on 17 January 2023 was not explained. Similarly, the second respondent seems to have made only a single payment of R 21,886 thereafter, notwithstanding the express intention of addressing the first respondent's indebtedness by way of a duly structured repayment plan. This was also not explained. On the same date, he mentioned that the first

¹² At paragraph [51].

¹³ The court may, of course, call for any other document which it considers necessary. See rule 46A(5).

respondent had secured projects that would generate additional income. Some six months later, on 29 August 2023, it was clear that the first respondent had yet to commence work on the projects; they were, nevertheless, described as 'lucrative'. This, too, was not explained.

[17] From the second respondent's papers, he indicated to the applicant on 1 September 2023 that he would be able to afford payments of R 20,000 to R 25,000 per month.¹⁴ This represented, however, an amount only marginally higher than what the first respondent was required to pay in terms of the monthly instalments under the home loan agreement. It did not account for the settlement of its arrears. Unsurprisingly, the applicant rejected the proposal on 4 September 2023. If the first respondent's failure to comply with its contractual obligations, notwithstanding the second respondent's employment at the Khonzinkosi Spar since 1 April 2022, as well as its failure to have taken any further meaningful steps to settle the arrears since the single payment made by the second respondent on 27 February 2023, then the renewed offer to pay R 20,000 per month (submitted by counsel in argument) rings hollow.

[18] Quite simply, the second respondent has failed to place any evidence before the court to persuade it that there are other means by which to satisfy the judgment debt. No further movable assets have been identified. Moreover, the second respondent's proposal, as detailed above, is plainly unacceptable. There is no reason why the court should not order execution against the first respondent's property.

Reserve price

[19] In terms of rule 46A(9), the court must consider whether a reserve price is to be set. The applicant has supplied details of the market value, and the amount owed for municipal rates and service charges. It has also indicated the extent of the first

¹⁴ Counsel submitted, in heads of argument, that the second respondent was willing to pay a monthly amount of R 20,000.

respondent's arrears when the applicant launched the present application, which was substantial (R 2,639,213) and which would have increased not inconsiderably during the intervening period. Considering such arrears, it cannot be said that any equity would be realised were the property to be sold even at the market value supplied (R 2,000,000); the extent of the first respondent's indebtedness is too great.

[20] Whereas the property might well be occupied by the second respondent's family, too little evidence has been presented to indicate why the sale of the property at a reserve price would cause undue hardship. If anything, then the second respondent's income seems to be sufficient to pay for the lease of alternative accommodation.¹⁵ Furthermore, the applicant's valuation report is favourable and indicates that there would be a reasonable demand for the property.

[21] If the method adopted by the court in *Firststrand Bank Ltd v Meyer*¹⁶ is applied in the present matter, then a reserve price of R 1,377,610 is achieved. The amount represents the forced sale value, calculated as 70% of the market value, less outstanding municipal rates and service charges. This is higher than that proposed by the applicant but would seem to be fair to the parties involved. The determination of a reserve price is, after all, not an exact science.¹⁷

Relief and order

[22] The court is persuaded that the applicant has met the requirements of rule 46A. The second respondent has failed to advance sufficient evidence to demonstrate that there are acceptable alternatives to execution against the residential immovable property

¹⁵ See how this aspect was addressed in *Nedbank Ltd v Malaka* 2023 JDR 0650 (GJ), where the respondent was employed at a mine in the Northern Cape for R 80,000 per month. At paragraph [22].

¹⁶ 2022 JDR 0995 (ECM).

¹⁷ *Op cit*, at paragraph [21].

in question. In accordance with the relevant principle enunciated in *Gundwana*, such execution is not a disproportionate means by which to satisfy the judgment debt.

[23] Regarding costs, there is no reason why the general rule should not apply. The applicant is entitled to the recovery thereof, including the costs reserved on 6 June 2024. No basis, however, has been pleaded for an order for payment on an attorney and client scale. The usual party and party scale applies (scale B).

[24] In the circumstances, the following order is made:

- (a) the first respondent's immovable property, situated at 8 Canna Place, Blue Bend, East London, more fully described as erf 2596 Beacon Bay, Buffalo City Metropolitan Municipality, Eastern Cape Province, in extent 796 square metres, held under deed of transfer number T12911/2018, subject to the conditions therein contained, is hereby declared executable;
- (b) a reserve price of R 1,377,610 is hereby set in relation to the sale in execution of the above immovable property; and
- (c) the respondents are ordered to pay the applicant's party and party costs, including the costs reserved on 6 June 2024, on scale B.

JGA LAING
JUDGE OF THE HIGH COURT

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