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

CASE NO. 2129/2020

In the matter between:

FIRSTRAND BANK LIMITED **Applicant**

and

RODERICK JULIUS MEYER **Respondent**

JUDGMENT

LAING J

[1] This is an application for default judgment and for the respondent's residential property to be declared executable. The applicant also seeks, *inter alia*, authorisation for the issue of a warrant of attachment, the execution thereof by the sheriff, and that the property may be sold in execution without a reserve price, alternatively subject to a reserve price, as stipulated. The provisions of rules 46 and 46A are pertinent.

Background

[2] On 9 December 2016, the parties entered into a written home loan agreement in terms of which the applicant loaned and advanced the sum of R365,000.00 to the respondent, which was secured by the registration of a mortgage bond over four

separate but contiguous erven located at 32 Brownlee Street, Molteno. The erven comprise a residential property with a dwelling situated thereon.

[3] In time, the respondent fell into arrears. By 9 January 2019, he was in arrears in the amount of R17,165.56 and owed the applicant the total sum of R375,966.43. The monthly repayment amount at the time was R4,197.81.

[4] Consequently, the applicant instructed its attorneys to issue letters of demand in terms of section 129 of the National Credit Act 34 of 2005 ('the NCA'), calling upon the respondent to rectify his breach of the underlying home loan agreement. The letters produced no result, prompting the applicant to institute action proceedings against the respondent, who received the applicant's summons at his chosen *domicilium citandi et executandi* on 15 April 2019. The respondent never defended the action.

[5] On 10 February 2020, the applicant brought the present application. The respondent has opposed the application; he is unrepresented.

[6] The respondent admits that he has fallen into arrears, but disputes the extent thereof. The main reason advanced for his having failed to maintain payments is the impact of the COVID-19 disaster management regulations, which prevented him from using the property as an accommodation establishment and letting out rooms to travellers. He has indicated that he intends to catch up on his arrears as soon as the market returns to normality.

[7] The respondent appears to accept the inevitability of the attachment and sale in execution of the property but points out that it would be in the best interests of both parties for the property to be sold at market value. He states that the property is currently for sale and that an estate agent is involved for such purposes.

Issues to be determined and discussion

[8] The issues to be determined are whether the applicant has made out a case for: (a) the granting of judgment; and (b) the declaration of the property as executable and associated relief.

[9] By reason of the residential nature of the property, the provisions of rule 46A are applicable. The applicant has supplied the following details: the market value of the property, as at 19 September 2019, was R330,000.00; the local authority valuation, as at 19 November 2019, was R450,000.00; the amount owing on the mortgage bond, as at 30 November 2019, was R407,651.06; and the amount owing to the local authority for rates and taxes, as at 18 November 2019, was R13,830.00. In addition, the applicant has proposed that the sale in execution be approached on the basis of its attorneys being provided with a mandate to purchase the property at a sale in execution for a 'buy-in figure' in the event that the property is not sold for at least that amount, after which the property would be advertised and put up for re-sale on the open market. This approach, argues the applicant, is preferable to setting a reserve price, which could discourage potential bidders from participating in the sale.

[10] The respondent has, in turn, indicated that the property is his primary residence. Moreover, it accommodates his two minor daughters when they do not reside with their mother at alternate times, as contemplated by the terms of a divorce settlement. There are long-term leases in place for two of the rooms in the dwelling and a portion of the property has been enclosed and established as a sanctuary for abandoned cats and dogs.

[11] In *Gundwana v Steko Development* 2011 (3) SA 608 (CC), the Constitutional Court observed, at [53], that it is a well-established principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. However,

> 'due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders.'

[12] The court in *Firstrand Bank v Folscher* 2011 (4) SA 314 (GNP) listed an extensive range of factors that could be considered when deciding whether a writ should be issued. Nevertheless, the court was careful to note, at [41], that not each

and every factor had to be taken into account for every matter; rather, the enquiry had to be fact-bound to identify the criteria that were relevant to the case in question.

[13] In the present matter, the applicant has alleged that several attempts were made to resolve the outstanding arrears by telephone; these were unsuccessful. Subsequently, the applicant instructed its attorneys to issue letters of demand on 25 January and 13 February 2019; these, too, failed to yield any result. The applicant caused summons to be issued and served on the respondent; this was never defended. The present application was brought on 16 January 2020 and the matter has been before court ever since.

[14] During the time that has since elapsed, a period of more than two years, the respondent has simply failed to bring his arrears up to date or to make any other acceptable arrangement with the applicant to address his breach of the underlying home loan agreement. He continues to dispute the extent of his arrears, notwithstanding the fact that the home loan agreement makes provision for a certificate of balance to be issued by the applicant, which would serve as evidence of the outstanding balance owed. The applicant attached same to its summons at the time of the institution of action proceedings, as well as details of the respondent's payment history. The respondent has not presented any evidence in support of his refutation of the amount claimed by the applicant. Moreover, he has not identified any assets, whether movable or immovable, that could be attached and sold in execution as an alternative to the attachment and sale of his residential property.

[15] In *Changing Tides 17 (Pty) Ltd NO v Frasenburg* [2020] 4 All SA 87 (WCC), Rogers J held as follows:

> '[51] 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 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.

> [52] If, however, it emerges from the rule 46A assessment that there are other assets from which the mortgagee's claim can be satisfied, the court would be justified in granting the money judgment but postponing or refusing an order of special executability. This is not only in accordance with the default mode of execution which has since time immemorial been embedded in our law; rule 46A itself points in that direction by requiring the court to consider whether the judgment debtor has other means from which the judgment debt ca be satisfied and to withhold an order of executability against the residential property if such other means exist (rule 46A(8)(d)). In such circumstances the court is not compelling the mortgagee to seize the debtor's proverbial pots and pans or (as alluded to in *Hendricks*) the debtor's sewing machine. The court is instead insisting that the mortgagee execute against other assets of substance which are known to exist.'

[16] Here, the respondent has failed to place any evidence before the court of other assets that may be used to satisfy the claim of the applicant. During argument, the respondent referred to the long-term leases and his plans to set up a fish-and-chips takeaway; he also mentioned the possibility of inheriting an amount of R100,000.00 from his late father's estate. However, these were vague, unsupported allegations. On the face of it, any income derived therefrom or any amount inherited would be patently insufficient to cover the amount owed in relation to the mortgage bond, which would now be well in excess of the amount of R407,651.06 that was outstanding on 30 November 2019. The attachment and sale of the residential property is the only viable option available to the parties.

[17] Admittedly the respondent would be compelled to secure alternative housing. Nevertheless, his minor daughters do not reside with him permanently and the existing tenants would presumably be protected by the long-term leases to which the respondent has referred. The sanctuary for abandoned cats and dogs could possibly be relocated with the assistance of its funder, Ouma Rusks, as mentioned by the respondent in his opposing affidavit.

Reserve price

[18] The only remaining aspect is whether a reserve price is to be set. The court requested further information from the parties about the current market value of the property. To that effect, the applicant submitted a valuation report (dated 15 February 2022), stating that the property is run down and that the estimated cost of repairs to be made before the property can be placed on the open market is R50,000.00. If such repairs were made then the estimated market value of the property would be approximately R400,000.00. The report goes on to state that the property would take about 24 months to sell on the open market. The forced sale value for the property is stipulated as R210,000.00.

[19] Despite having made the allegation, during argument, that the market value of the property was at least R500,000.00, the respondent has failed to substantiate same and has failed to furnish the court with the information requested previously. The court is constrained to rely upon the information provided by the applicant.

[20] Mindful of the details contained in the application made by the applicant, including the fact that the realisable value of the property is likely to be considerably lower than the amount owed on the mortgage bond once the cost of repairs and amounts owed for rates and taxes are taken into account, the court is not persuaded that an approach based on the applicant's stipulation of a 'buy-in figure' would be fair to the respondent. The amount suggested, R128,468.80, is significantly less than the forced sale value described in terms of the valuation report. It would seem to be more sensible (and fairer to both parties) to set a reserve price and to ascertain whether there is indeed a market for the property in the first place. If the reserve price is not met then the applicant may simply rely on the procedures available to it under rule 46A(9)(c) - (e) and request the court to order how execution should proceed further.

[21] In argument, the applicant submitted that an appropriate reserve price would be R259,000.00. This is based on a forced sale value, calculated as 70% of the average market price of R390,000.00, less outstanding rates and taxes. The suggested reserve price does not, of course, take into account the applicant's recent valuation report, which estimates the market value to be R400,000.00 (assuming that repairs can first be carried out); it also does not take into account any possible increase

in the outstanding rates and taxes. Nevertheless, the determination of a reserve price is not an exact science and the purpose of such determination is to strike a balance between protecting the interests of the judgment creditor, in the recovery of a substantial amount owed to it, and the interests of the judgement debtor, in the attachment and sale of his residential property. The reserve price suggested by the applicant is not inappropriate.

Relief to be granted and order

[22] Consequently, the court is satisfied that the applicant has made out a case for the granting of judgment, the declaration of the property as executable, and associated relief. The proviso thereto is that a reserve price be set for purposes of the sale in execution.

[23] The only remaining issue is that of costs. There is no reason why costs should not follow the result and that the respondent be liable therefor, including the costs reserved in relation to the postponements on 31 March and 27 July 2021. It is apparent from the court file that the matter could not be heard on 11 November 2021; no costs order is made in that regard.

[24] The following order is made:

(a) the application is granted in terms of paragraphs 1, 2, 3, 4, 5, 7 and 8 of the notice;

(b) the immovable property of the respondent shall be sold by the sheriff, subject to achieving a reserve price of R259,000.00; and

(c) the respondent is liable for the costs of the postponements on 31 March and 27 July 2021, on an attorney and client scale.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the applicant:	Adv Sephton, instructed by Huxtable Attorneys, Makhanda.
For the respondent:	Mr Meyer (In person).
Date of hearing:	03 February 2022
Date of delivery of judgment:	19 April 2022