REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

In the matters between:

Case No. 2011/9130

FIRSTRAND BANK LIMITED — Plaintiff

versus

MARK POWELL — Defendant

and

Case No. 2011/20765

FIRSTRAND BANK LIMITED — Plaintiff

versus

FAITH NELISIWE NSELE — First Defendant

NCANE AGNES NSELE — Second Defendant

and

Case No. 2011/31969

FIRSTRAND BANK LIMITED — Plaintiff

versus

RAYMOND LEWIS CECIL HERBST — First Defendant

PATRICIA ELISE HERBST — Second Defendant

JUDGMENT

MEYER, J

[1] In each of these matters - *Firstrand Bank Ltd v Powell* (SGHC case no 2011/9130), *Firstrand Bank Ltd v FN & NA Nsele* (SGHC case no 2011/20765), and *Firstrand Bank Ltd v Herbst* (SGHC case no 2011/31969) – default judgment has already been granted by the registrar against the defendants for payment of certain amounts and interest thereon. FNB now seeks an order to declare the immovable property in each matter immediately executable in terms of Rule 46(1) of the Uniform Rules of Court.

[2] The application for execution against the immovable property in *Powell* states that such application would be made on Tuesday, 4 October 2011. The return of service of the application reads:

> 'That on the 12 October 2011 at 13h50 at 29 VILLA SEVILLE, BEYERSPARK, BOKSBURG, 1460 being the residence of the Defendant a copy of the APPLICATION FOR EXECUTION IN TERMS OF RULE 46(1) was served by affixing it to the principal door, as the premises was found locked. After a diligent search and enquiry, no other manner of service was possible at the given address.'

The *Powel* application was enrolled for hearing on Tuesday, 29 November 2011. Such being a different date to the one stated in the application necessitated service of the notice of set down on the defendant. That return of service reads:

> 'That on the 02 November 2011 at 17h10 at 29 VILLA SEVILLE, BEYERSPARK, BOKSBURG, 1460 being the chosen domicilium citandi et executandi of MARK POWELL a copy of the NOTICE OF SET DOWN was served by affixing to the gate. After a diligent search and enquiry at the given address no other manner of service was possible. Rule 4(1)(a)(iv).'

The address referred to in the returns of service is the address nominated by the defendant in terms of clause 4.34 of the applicable written loan agreement '… for all

communications and service of notices in respect of any legal proceedings which may be instituted …'

[3] The application for execution against the immovable property in *Nsele* states that such application would be made on Tuesday, 18 October 2011. The return of service in respect of the first defendant reads:

> 'That on the 03 October 2011 at 18h40 at 104 SUNBIRD ESTATE, SUNDOWNER being the chosen domicilium citandi et executandi of FAITH NELISIWE NSELE a copy of the APPLICATION FOR EXECUTION IN TERMS OF RULE 46(1), Affidavit in Support of the Application for Execution of Immovable Property by Randheer Maharaj, S was served by affixing to the principal door. After a diligent search and enquiry at the given address no other manner of service was possible. Rule 4(1)(a)(iv).
> NB: PREMISES LOCKED.
> NB. THE NAME OF THE STREET IS METEOR ROAD.
> ATTEMPT(S):
> 23 September 2011 at 11h52 – AUTOMATIC GATE TO COMPLEX LOCKED. LEFT NOTE
> 01 October 2011 at 12h03 - AUTOMATIC GATE TO COMPLEX LOCKED. LEFT NOTE.'

The return of service in respect of the second defendant is similar to the one in respect of the first defendant. The *Nsele* application was also enrolled for hearing on Tuesday, 29 November 2011. Returns of service in respect of the notice of set down for 29 November 2011 are not in the court file. The physical address '…for service of all forms, notices and documents in respect of any legal proceedings which may be instituted …' nominated by the defendants in terms of clause 5.33.2 of the applicable written loan agreement is '104 Sunbird Estate Sundown Northgate'.

[4] The application for execution against the immovable property in *Herbst* states that such application would be made on Tuesday, 25 October 2011. The return of service in respect of the first defendant reads:

> 'That on the 12 October 2011 at 09h35 at 463 GELDING ROAD, POORTVIEW, ROODEPOORT being the chosen domicilium citandi et executandi of RAYMOND LEWIS CECIL HERSBT – 1ST RESPONDENT/DEFENDANT a copy of the APPLICATION FOR EXECUTION IN TERMS OF RULE 46(1) was served by affixing to the outer door. After a diligent search and enquiry at the given address no other manner of service was possible. Rule 4(1)(a)(iv).
> NB: THIS WAS THE ONLY MANNER OF SERVICE POSSIBLE AS THE PREMISES WAS FOUND VACATED AND UNATTENDED.

The return of service in respect of the second defendant is similar to the one in respect of the first defendant. The *Herbst* application was also enrolled for hearing on Tuesday, 29 November 2011. Returns of service in respect of the notice of set down for 29 November 2011 are not in the court file. Clause 20 of the applicable mortgage bond provides that '[f]or the purposes of this Bond and of any proceedings which may be instituted by virtue hereof, and of the service of any notice, *domicilium citandi et executandi* is hereby chosen by the Mortgagor at 463 GELDING ROAD, POORTVIEW'.

[5] These three matters initially came before me in the second motion court during the motion court week that commenced on Tuesday, 29 November 2011. That court *inter alia* deals with hundreds of this type of applications on a weekly basis in which the sales in execution of people's homes are sought. Service in most instances was effected at the chosen *domicilium citandi et executandi* by affixing a copy to the 'outer' door, the 'principal' door, the gate, the 'main' gate, and the like, or by leaving a copy somewhere on the premises, such as under a stone. Instances of service on a human being, qualified to receive service, are rare. The ineluctable inference, in my view, is that debtors are invariably at work during weekdays when service of process and of documents are mostly effected by sheriffs, unless they have moved away from, or vacated, the premises where service was effected.

[6] I have, bearing in mind the constitutionally entrenched right to housing, in most instances where service was effected at the chosen *domicilium* by affixing a copy or by simply leaving it somewhere, not been satisfied as to the effectiveness of such service, and ordered further steps to be taken. The order which I invariably make is in the form of a *rule nisi* with more or less the following wording:

> 1. The respondent is called upon to furnish reasons on (date) at 10h00 or as soon thereafter as the matter may be heard why the following order should not be made:
>
> (Prayers contained in the application or summons)
>
> 2. A copy of this order and the application herein must forthwith be served at the respondent's place of employment, and, only if a return of non-service is rendered in respect of such service, upon the respondent's residential address on a Saturday.

[7] In *Firstrand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) para [46], the full court said that the issue of a practice directive to ensure that personal service was effected as far as possible in these type of matters '… appears to be unwarranted, and could create uncertainty, quite apart from causing delay and additional costs that would have to be borne by the debtor.' This *dictum* should not be regarded as detracting from the discretion a court always has with regard to the effectiveness of service. Rule 4(10) of the Uniform Rules of Court provides that '[w]henever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as to it seems meet.' The order referred to in the previous paragraph does not require personal service, although personal service may result in many instances, and it is always subject to any order of court relating to the sufficiency or otherwise of service in a particular case.

[8] It is only when service at a chosen *domicilium* of notices of motion and of summonses initiating proceedings to declare a debtor's primary residence specially executable and of the notices of set down when the date of hearing differs from the one stated in the application for judgment is effected by affixing a copy to the outer or the principal door, the gate or the main gate, and the like, or by leaving a copy somewhere at the premises, such as under a stone, that a rule *nisi* is issued in order to inform the debtor when the matter will be before the court and to ensure the effectiveness of service. Delivering a copy of the process or document to the debtor personally or to a person who qualifies to receive service at the debtor's *domicilium* or residential address or place of employment, has the important benefit that the sheriff serving the process or documents is, in terms of Rule 4(1)(d) of the Uniform Rules of Court, under a duty to explain the nature and contents thereof to the person upon whom service is being effected and to state in his or her return that he or she had done so.

[9] Counsel for FNB objected on behalf of the bank that similar orders be made in these three matters. Counsel's submissions ignore the nature of these applications and that particular caution as to the effectiveness of service is required for certain types of proceedings. Subject to any order of court in a particular case, personal service is required in this division and considered warranted in proceedings, such as divorce actions, claims for incarceration and applications for sequestration. I am of the view that any delay and additional costs incurred in ensuring effective service in proceedings to declare a debtor's primary residence specially executable are warranted and necessary.

[10] In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), para [34], Mokgoro, J concluded that '… any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)' of the Constitution. All proceedings to declare a debtor's primary residence specially executable require judicial oversight and evaluation of various factors in order to ensure that there is not an unjustifiable interference with that person's constitutionally entrenched right to housing. See: *Gundwana v Steko Development* 2011 (3) SA 608 (CC) and Rule 46 (1)(a)(ii) of the *Uniform Rules of Court*. This constitutional requirement, in my view, also warrants particular caution in ensuring the effectiveness of the service of the process and documents in proceedings to declare a debtor's primary residence specially executable. A '… party's recourse on getting to know of a default judgment – once the horse has bolted – is a poor substitute for the initial judicial evaluation.' *Per* Froneman J in *Gundwana*, para [50]. Also see *Jaftha*, para [49].

[11] An appropriate analogy where delay and additional costs are warranted in ensuring that effective notice of the proceedings are given to those whose constitutional right to housing might be infringed, is proceedings for the eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('the PIE Act'). In interpreting the provisions of s 4 of the PIE Act, the Supreme Court of Appeal held that '… the s 4(2) notice is intended as an additional notice of forthcoming eviction proceedings …', and that '… the contents and the manner of service of the notice … must be authorised and directed by an order of the court concerned'. *Per* Brand AJA in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA), paras [11] and [20].

[12] In the result the following orders are made:

A. In *Firstrand Bank Ltd v Powell* (SGHC case no 2011/9130):

1. The defendant is called upon to furnish reasons on Tuesday, 10 April 2012 at 10h00 or as soon thereafter as the matter may be heard why the following order should not be made:

1.1 The immovable property, being Erf 2040 Protea Glen Extension 1 Township Registration Division I.Q. Province of Gauteng, be declared executable;

1.2 The defendant be ordered to pay the costs of the application.

2. A copy of this order and of the application herein must forthwith be served at the defendant's place of employment, and, only if a return of non-service is rendered in respect of such service, upon the defendant's *domicilium* or residential address on a Saturday.

B. In *Firstrand Bank Ltd v FN & NA Nsele* (SGHC case no 2011/20765):

1. The defendants are called upon to furnish reasons on Tuesday, 10 April 2012 at 10h00 or as soon thereafter as the matter may be heard why the following order should not be made:

1.1 The immovable property, being Portion 19 of Erf 17686 Protea Glen Extension 8 Township Registration Division I.Q. Province of Gauteng, be declared executable;

1.2 The defendants be ordered to pay the costs of the application.

2. A copy of this order and of the application herein must forthwith be served at the defendants' places of employment, and, only if a return of non-

service is rendered in respect of that service, upon such defendant's *domicilium* or residential address on a Saturday.

C. In *Firstrand Bank Ltd v Herbst* (SGHC case no 2011/31969):

1. The defendants are called upon to furnish reasons on Tuesday, 10 April 2012 at 10h00 or as soon thereafter as the matter may be heard why the following order should not be made:

   1.1 The immovable property, being Erf 381 Willowbrook Extension 3 Township Registration Division I.Q. Province of Gauteng, be declared executable;

   1.2 The defendants be ordered to pay the costs of the application.

2. A copy of this order and of the application herein must forthwith be served at the defendants' places of employment, and, only if a return of non-service is rendered in respect of that service, upon such defendant's *domicilium* or residential address on a Saturday.

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P.A. MEYER
JUDGE OF THE HIGH COURT

6 March 2012

Final date of hearing: 2 February 2012
Date of judgment: 6 March 2012
Counsel for applicants: Adv C Denichaud
Attorneys for applicant: Glover Inc., Parktown

Ref: Mr B van der Merwe