IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2014/13867

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the interlocutory application between:-

FIRSTRAND BANK LIMITED t/a RMB PRIVATE BANK	Applicant

And

1301 MYRTLE ROAD, FOURWAYS GARDENS CC	First Respondent
KOKOSIOULIS, VASILOIS	Second Respondent
KOKOSIOULIS, EVANGELIA	Third Respondent
KOKO IMPORTERS AND DISTRIBUTORS (NATAL) CC	Fourth Respondent

JUDGMENT

NALANE AJ:

INTRODUCTION

[1] Applicant seeks judgment for payment of the sum of R5 850 485.05 and interest at the rate of 11% per annum from 26 March 2014 to date of final payment, calculated daily and compounded monthly.

[2] Applicant seeks another order declaring certain immovable property specifically executable. The property is Erf [1…..] [F……] [Ext …..] township registration division JR, the Province of Gauteng in extent 1069 (ONE THOUSAND AND SIXTY NINE) square metres held under deed of transfer [T……..] ("the property").

[3] The material facts are largely common cause. Applicant is a bank and advanced certain monies to the Respondents over a period of time commencing 13 December 2000. Applicant and Respondents concluded agreements which are styled a single facility agreement. A series of these agreements were concluded over a period of time.

[4] On 12 August 2010 the Applicant and Respondents concluded another credit facility agreement for the sum of R4 652 000.00 ("the agreement"). This is the agreement which is alleged to have been breached by the Respondents.

[5] The Second, Third and Fourth Respondents executed deeds of suretyship ('the deeds') on behalf of the First Respondent which is a close corporation. The Fourth Respondent which is a close corporation has been liquidated.

[6] The Respondents fell into arrears and the Applicant commenced legal proceedings claiming payment. On 18 March 2013, prior to the issuing of legal action the Applicant sent a letter of demand to the Respondents.

[7] Respondents raised the following defences viz that the Applicant is obliged to have referred the dispute to the Banking Ombudsman ("the ombudsman"); the certificate of indebtedness is incorrect; and that the property should not be declared specifically executable. I will deal with each of the defences individually.

The ombudsman

[8] The import of this defence is that the dispute between the parties should have been referred to the ombudsman in terms of clause 13.3.4 of the agreement prior to the issuing of the present application.

[9] Clause 13.3.4 provides as follows:

> "*13.3.4 The following process will be followed should your facility remain in default for a period longer than 20 (twenty) days;*

13.3.4.1 The bank will draw such default to your notice in writing by prepaid registered mail affording you 7 (seven) days to rectify such default, alternatively proposing that you refer this Facility to a Debt Counselor, alternatively a Dispute Resolution Agent, a Consumer Court or Ombud with jurisdiction;

13.3.4.2 Should you not rectify your default within the requisite time period as set out in the aforesaid paragraph, alternatively avail yourself of any other measure as set out above, your Facility will be handed to attorneys for recovery."

[10] According to the Respondents they referred a dispute about the agreement to the ombudsman in March 2013. They submit that the parties had to follow the process prescribed by the ombudsman and only after the dispute could not be settled by the parties through this process, could the ombudsman intervene.

[11] This defence is not supported by a reading of clause 13.3.4. The basic rule of interpretation is that the intention of the parties must be sought in the words they used and that their words must be given their ordinary grammatical meaning[1].

[12] Clause 13.3.4 provides in essence that if the Respondents are in default they may refer the agreement to an ombud with jurisdiction. Nowhere does the clause state that if the dispute cannot be settled by the parties through the process prescribed in the clause that the ombudsman could then intervene.

[1] Law of South Africa Volume 12(1) - Second Edition Volume

[13] The Respondents' main argument is that until such time that the ombudsman has adjudicated on the dispute between the parties, the Applicant is precluded from referring the default to its attorneys for recovery.

[14] This argument cannot be sustained. In the first place the Respondents referred a dispute to the ombudsman on 19 March 2013 prior to the Applicant's letter of demand dated 18 November 2013 and even before the current application was launched on 15 April 2014. This is one of the common cause facts.

[15] The dispute which was referred to the ombudsman was not a response to the letter of demand of 18 November 2013. The letter of demand recorded that the First Respondent was in breach of the agreement in that the account was in arrears in the amount of R1 166 509.92 as at 23 October 2013. The letter of demand advised the Respondents of their rights in terms of clause 13.3.4.

[16] The dispute referred to the ombudsman was summarized in a letter by the ombudsman dated 2 December 2013 directed to the Second and Third Respondents. It is not the dispute forming the subject matter of this application. The dispute referred to the ombudsman was a complaint that the Applicant acted prejudicially in an investigation regarding some irregularities in the sale of the Second and Third Respondents' Cape Town property (Brillianto) through Auction Alliance. Another complaint was that a representative of the Applicant coerced them into signing a special power of attorney and prejudiced them through delaying the process of transfer of the Cape Town property for a number of months.

[17] The letter of 2 December 2013 further advised that the ombudsman had considered the Applicant's response to the complaint. In the assessment of the ombudsman the amount involved exceeded the limits of jurisdiction of the ombudsman in that it was in excess of R2 million, and the Applicant had not agreed in writing to the limitation being exceeded.

[18] The ombudsman further advised that in its opinion, despite the fact that it lacks jurisdiction, there is a clear dispute of fact which can only be tested in a court of law which is a more appropriate forum to determine the dispute. The ombudsman concluded that the claim was based on consequential damages and it did not have a mandate to make a finding on these kinds of matters. The ombudsman advised that it could not pursue the matter further and closed its file.

[19] In short therefore the Respondents never referred a dispute to the ombudsman in response to the letter of demand of 18 November 2013. At the time of the letter from the Applicant the Respondents had already referred another dispute to the ombudsman.

[20] Although the Respondents argued that the two disputes are linked in that they sought to dispose of the Cape Town property and to use the proceeds to settle their arrears arising from the agreement on which they are currently sued. In my opinion this argument cannot be accepted in that the ombudsman was never asked to determine the dispute regarding the arrears. The ombudsman was asked to resolve a different dispute relating to the Cape Town property.

[21] The Respondents argued that in an email dated 1 December 2013 a certain Helena van der Merwe of the ombudsman had advised them that she had received their letter dated 5 December 2013 and confirmed that she would be reviewing their case.

[22] I enquired from the Respondents' counsel what the desired outcome of the review by the ombudsman is. The response was that the Respondents still persist with the complaint regarding the alleged under selling of their Cape Town property by the Applicant and the alleged coercion to sign the special power of attorney. This is in spite of the fact that the dispute was referred to the ombudsman more than a year ago on 19 March 2013 and the Respondents have done nothing concrete to have the dispute resolved. This is the selfsame dispute which was referred to the ombudsman prior to the letter of demand dated 18 November 2013, and which the ombudsman did not entertain due to lack of jurisdiction.

[23] It is my view that the process prescribed in clause 13.3.3.4 does not bar the Applicant from instituting action but is simply a mechanism to allow the Respondents to refer their default to an alternative dispute resolution institution, prior to the commencement of legal action.

[24] It could never have been the intention of the parties that all that the Respondent had to do was to refer a dispute to the ombudsman and do absolutely nothing to finalise it and that this would have the effect of preventing the Applicant from instituting any legal action until the ombudsman finalizes the dispute.

[25] In any event as the evidence shows the ombudsman did consider the dispute and did not uphold it.

[26] The parties presented two conflicting versions of an email dated 11 December 2013 from Helena van der Merwe ("van der Merwe") of the office of the ombudsman. The version of the email relied upon by the Respondents simply states that van der Merwe had received the complaint and was reviewing their case. The one relied upon by the Applicant has the following additional sentence, "…*however, I reiterate that the review does not prohibit the bank from taking legal action against you in the interim*".

[27] I was asked by the Applicants to find that the email version relied upon by the Respondents has been manipulated to exclude the sentence to which I have just referred to. I need not definitively make a finding. Van der Merwe did not file an affidavit confirming that her email had been manipulated. However on the other hand the Respondents did not deny the version relied upon by the Applicant.

[28] The Applicant argued that the complaint that was lodged by the Respondents was not upheld. In support the Applicant attached to its replying affidavit an email dated 23 February 2015 from Helena van der Walt of the ombudsman's office stating that the complaint was dealt with and not upheld. The Respondents have not challenged the email from Helena van der Walt. They did not file any affidavit refuting this. I accept that the ombudsman advised the Applicant that the complaint of the Respondents was dealt with and not upheld.

[29] If I am wrong and the referral to the ombudsman prevents the Applicant from instituting legal action prior to resolution of the complaint, then I am satisfied that the ombudsman has dealt with the dispute / complaint referred to it by the Respondents. Clause 13.3.4 does not bar the Applicant from instituting action. In any event as I have found, the dispute which was referred and dealt with by the ombudsman is not the dispute which arose as a result of the letter of demand of 18 November 2013.

[30] I therefore dismiss the defence based on the referral to the Ombudsman.

Certificate of indebtedness

[31] The next defence raised related to the certificate of indebtedness. This defence was not pursued further in that the parties agree that the Applicant rectified the initial certificate of indebtedness which was attached to the founding affidavit. In any event in argument the Respondents' counsel conceded that the amount contained in the certificate of indebtedness is not in issue.

Deeds of suretyship

[32] The other ground of challenge was based on the deeds of suretyship. The defence is that the single credit facility letter dated 11 December 2000 required suretyships to be signed and yet those suretyships were not attached to the founding papers. The Respondents do not deny that in respect of the latest agreement on which the Applicant relies, they signed suretyships. The suretyships referred to in the facility agreement of 11 December 2000 are

therefore irrelevant. This defence based on the deeds of suretyship is therefore not sustainable and dismissed.

Primary residence

[33] The last defence is that the property cannot be declared specifically executable because it is the primary residence for the Second and Third Respondents, their two children (one of them being a minor) and the Third Respondent's elderly mother. It is submitted on behalf of the Respondents that on the strength of ***Mkhize v Umvoti Municipality***[2] judicial oversight is required in all cases of execution against immovable property aiming to ensure that the constitutional rights to adequate housing is not violated[3]. It is submitted that should the property be sold in execution, the Second and Third Respondents, their children and the Third Respondent's mother will be left destitute and that the court should exercise its discretion in its judicial oversight in favour of denying the prayer to have the property specifically executable.

[34] On the other hand Applicant argues that the First Respondent is a legal entity and as the owner of the property, it is separate from the Second and Third Respondents and enjoys no right to adequate housing. Another submission is that there is no bar to the judgment being granted and that considerations of adequate housing will only become relevant in the event that an eviction order

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[2] 2012 (1) SA 1

[3] section 26 of the Constitution provides as follows **:** "**26 Housing**
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

is sought. Therefore at this stage the issue of access to adequate housing does not arise.

[35] The issue of access to adequate housing in the context of execution of judgments has enjoyed judicial attention.[4]

[36] Rule 46 of the Uniform Rules of Court applies to execution of immovables. The relevant rule reads as follows:

"46 **Execution – immovables**

"1. No writ of execution against immovable property of any judgment debtor shall issue until

(i) ……. ; or

*(ii) such immovable property shall have been declared to be specifically executable by the court or, in the case of the judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, **(own underlining)** no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."*

[4] see for instance **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others** 2005(2) SA 140 in which it was held that section 66(1) of the Magistrates' Court Act 32 of 1944 constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure (see p160 par 52 I-J

[37] The Applicant referred the court to the decision of ***Firstrand Bank v Folscher***[5] for the authority that constitutional considerations referred to in section 26 of the Constitution in declaring immovable property specially executable, do not apply as the First Respondent is a juristic person.

[38] The proviso to the rule, as I read it, does not require that the property sought to be attached should be owned by the judgment debtor. All that the rule requires is that the property should be the primary residence of the judgment debtor.

[39] In the ***Folscher*** matter the court was specifically asked by the Honourable Deputy Judge President of the North Gauteng High Court to interpret rule 46(1)(a) (ii) in so far as it refers to all relevant circumstances that must be considered before issuing a writ of a warrant of execution.

[40] The court held that execution levied against immovable property that is a judgment debtor's home constitutes a significant limitation upon the fundamental right to access to the roof over a person's head.[6] Furthermore the court held that subsection 26 (3) protects the homeowner and the "**home occupier**" (my emphasis) against arbitral eviction or demolition and ensures judicial oversight before an order of eviction or demolition may issue.

[41] The court further held that the protection afforded to owners and occupiers, of their dwellings, in section 26, is rooted in section 34 of the constitution, which establishes the general right for every person living in the Republic "*to have*

[5] 2011 (4) SA 314
[6] p.323 at par 12(h)

any dispute that can be resolved by the application of law in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum".

[42] In ***Folscher*** it was held that a primary residence is the same concept as a home of a person[7]. The Applicant has denied the allegation by the Respondent by the Respondents that the property is utilized as a primary residence of the Second, Third Respondents and their family. This is a bare denial and in any event the Applicant adds that this is irrelevant because the property is owned by the juristic entity.

[43] The judgment in ***Folscher*** suggests that the term "*judgment debtor"* in the context of rule 46 (1)(ii) refers to an individual, a person and that "*it is therefore the primary residence owned by a person that falls within the purview of rule*."[8]

[44] The introductory part of rule 46(1)(a) reads as follows : *"No writ of execution against the immovable property of any judgment debtor shall issue until - …"* The rule thus applies in respect of immovable property owned by the judgment debtor. However the proviso to rule 46(1)(a)(ii) provides for judicial oversight where the property sought to be attached *"is the primary residence of the judgment debtor"*. The proviso requires only that the property should be the primary residence of the judgment debtor and not that the latter should be the owner.

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[7] p329 par 29
[8] p329 par 31H

[45] The court in ***Folscher*** also held that immovable property owned by a company, close corporation or a trust, of which the member, shareholder or beneficiary occupier, is not protected by the amended rule requiring judicial oversight by way of an order of court authorizing a writ of execution, even if the immovable property is the shareholder's, member's or beneficiary's own residence.[9]

[46] The proviso to the rule refers to the primary residence of the judgment debtor. The reference to the judgment debtor can only be to a natural person as only a natural person can have a primary residence.

[47] A distinct factor in this matter is that although the immovable property is owned by the First Respondent, a juristic person, the Applicant seeks judgment against the Second and Third Respondents as well as are natural persons. The Respondents are therefore entitled to the protection of rule 46(1)(a) (ii).

[48] In ***Jaftha***[10] the court noted that the circumstances under which a debtor incurred a debt is important in considering whether to order a property executable and that if the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure.[11] This noting was accepted by the court in ***Standard Bank of South Africa Ltd v Saunderson and Others.***[12] In the latter case the court

[9] p.329 para 32(i)
[10] supra
[11] p162 par 58F
[12] 2006 (2) SA 264 at 274H

held that the sole fact that the property is residential in character is not enough to found the conclusion that an infringement of s 26(1) will necessarily occur.

[49] Although the court in ***Saunderson*** did not decide the application of the right of access to adequate housing in the case of bonded property it observed that it is possible that s 26(1) may be infringed by execution.[13]

[50] In ***Gundwana v Steko Development***[14] the Constitutional Court held that to agree to a mortgage bond does not, without more, entail agreement to forfeit one's protection under s 26(1) and (3) of the Constitution.[15] The court held that execution orders relating to a person's home all require evaluation [16]. ***Gundwana*** overturned ***Saunderson*** and ***Nedbank Ltd v Mortinson***[17] to the extent that they found that the registrar was constitutionally competent to make execution orders when granting default judgment in terms of rule 31(5)(b) of the Uniform Rules[18]. The Constitutional Court thus established that in the case of execution of a person's home judicial oversight must be exercised.

[51] In ***Mkhize***[19] the court held that the only way to determine whether the right to adequate housing has been compromised is to require judicial oversight in all cases of execution against immovable property on a case-by-case basis.[20]

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[13] p276 par 25 F
[14] 2011(3) SA 608
[15] p625 A-D
[16] p625 par 50F
[17] 2005(6) SA 462 (W)
[18] pp625 par 52 – p626A
[19] supra
[20] p13 A-B

[52] I am therefore satisfied that in the circumstances of this case where judgment is sought against the Second and Third Respondents and the property sought to be attached is their primary residence that I should exercise my discretion not to authorize the property executable until all the relevant circumstances have been properly ventilated before the court.

[53] Having regard to the circumstances of this matter, it is undeniable that the Second and Third Respondents reside in the property and this is their primary residence. This matter implicates the fundamental rights of the Second and Third Respondents. It may well be that upon consideration of all relevant circumstances execution is appropriate. However in the absence of all the relevant circumstances as required by rule 46, I am not satisfied that declaring the property executable would be appropriate at this stage.

Conclusion

[54] Accordingly I am satisfied that the Applicant has made out a case for the money judgment. I am not satisfied that a case has been made for an order declaring the property executable.

[55] I therefore grant the following order:

1. First, Second, Third and Fourth Respondents (jointly and severally the one paying the other to be absolved) are ordered to pay the sum of R5 850 498.05 to the Applicant;

2. Interest is payable on the aforementioned amount at the rate of 11% per annum from 26 March 2015 to date of final payment, calculated daily and compounded monthly;

3. Respondents are to pay costs of the application on the attorney and client scale.[21]

Nalane, F J
Acting Judge of the High Court of South Africa

Appearances:

For Applicant:	Adv L Van Tonder
Instructed by:	Lowndes Dlamini Attorneys
For Respondents:	Adv Van Rhyn Fouche
Instructed by:	David Bayliss Attorneys
Date of hearing:	06 October 2015
Date of judgment:	17 November 2015

[21] The agreement provides for costs on attorney and client scale