REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes

2/9/2021
DATE SIGNATURE

Case No.: 2020/11190

In the matter between:

JAN VAN DEN BOS N.O. Applicant

and

MOHLOKI, HERMAN RAMOKHELE First Respondent

MOHLOKI, PATRICIA Second Respondent

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY Third Respondent

AND

Case No.: 2020/11191

In the matter between:

JAN VAN DEN BOS N.O. Applicant

and

NGCAMEVA, NOMVAKALISO FLORENCE First Respondent

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY Second Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. Can, and should, this court as a division of the High Court declare immovable property specially executable pursuant to orders granted in the magistrates' court? Further, does Uniform Rule 46A apply only in respect of execution against residential immovable property that are the primary residences of judgment debtors, or to all residential immovable property?

2. The relevant facts for purposes of the judgment can be briefly stated.

3. The applicant acts in his capacity as a court appointed administrator of the Panarama Place body corporate for a sectional title scheme established in terms of the Sectional Titles Act, 1986. The sectional title scheme is situated in Berea, Johannesburg.

4. The relevant respondents are registered owners of sections (units) in the sectional title scheme. The applicant acting in his capacity as administrator of the body corporate obtained orders by default against the relevant respondents in the Johannesburg Magistrates' Court for arrear contributions and other charges owing to the body corporate. Attempts to execute on warrants of execution issued out of the magistrates' court were unsuccessful as no attachable movable assets belonging to the respondents could be found at the units, with the deputy sheriffs rendering *nulla bona* returns of service. Applications by the respondents in the magistrates' court for rescission of the default orders failed. The respondents have sought to appeal the refusal of the rescissions to the High Court. The applicant contends that the respondents are not pursuing those appeal proceedings with any vigour.

5. The applicant seeks to paint a picture of the respondents being recalcitrant owners who have not paid their contributions and other charges owing to the body corporate for many years, and so much so that the judgment debts exceed the municipal values of the sectional title units. The respondents on the other hand seek to paint a picture of an administrator who does not genuinely seek to advance the interests of the

body corporate and the sectional title owners, and who refuses to properly account for payments that he has received. It is unnecessary for me to decide which of these pictures is correct as I am bound to proceed on the basis that the orders granted in the magistrates' court stand until rescinded or set aside on appeal. Although the respondents, who were represented in the hearing before me by their attorney, Mr Kubayi, asserted that execution proceedings are stayed until the appeal proceedings in respect of the rescission applications have been determined, this is not so.[1]

6. The applicant, relying upon the *nulla bona* returns of service rendered pursuant to the warrants of execution issued out of the magistrates' court, launched these present proceedings in the High Court to declare the units as immovable properties specially executable, and to authorise that writs of execution be issued in terms of Uniform Rule 46(1)(a).

7. Before the hearing of the matter, I requested the parties to make submissions[2] whether the High Court has jurisdiction to, and should,

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[1] *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and another* 2016 (6) SA 466 (GJ), not following the earlier decision of *Khoza and others v Body Corporate of Ella Court* 2014 (2) SA 112 (GSJ), which was in any event distinguished. See also *Pine Glow Investments (Pty) Ltd v Brick-On-Brick Property and Others* 2019 (4) SA 75 (MN), which applied and approved *Willison Court* and not *Khoza*.

[2] No objection was raised during the hearing that I had raised this issue *mero motu*. The issue of whether the High Court should be enforcing the judgment of another court was *mero motu* raised in *Dreyer v Wiebols and others* 2013 (4) SA 498 (GSJ), which was an opposed matter, and in *Giant Properties (Pty) Limited v Govender* 2004 CLR 27 (W), which was an unopposed matter. In any event, given the judicial

declare immovable properties specially executable in relation to judgments granted in the magistrates' court. My concern was that it was not readily apparent to me that the High Court should be approached to declare immovable property executable pursuant to orders granted in the magistrates' court and where the execution process had been initiated in the magistrates' court.

8. I was informed by applicant's counsel that it was not unusual for this Division of the High Court to grant such orders but that she was unable to locate any judgments squarely on point. I too was unable to find any judgments squarely on point.

9. The applicant's primary submission was that this court did have jurisdiction to declare immovable property executable, and as the applicant had elected to come to this court seeking such a declaration, this court was obliged to hear the application. I was referred to the recent decision of *The Standard Bank of South Africa Limited and others v Thobejane and Others*[3] where Sutherland AJA for the Supreme Court of Appeal in a strongly worded judgment held that the High Court must entertain matters within its territorial jurisdiction if brought before it although the magistrates' courts may have concurrent jurisdiction and that

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oversight role of the court when it is approached for an order to declare immovable property executable, the scope for a court to *mero motu* raise issues is considerably widened.

[3] The full citation is *The Standard of South Africa Limited and others v Thobejane and Others* [38/2019 and 47/2019] and *The Standard Bank of South Africa Limited v Gqirana N.O. and Another* [999/2019] [2021] ZASCA 92 (25 June 2021).

the High Court must respect an applicant's choice of forum.[4] The applicant's submission was that this was dispositive of the concern that I had raised.

10. Sutherland AJA went further in *Thobejane* and found that there was no obligation in law on financial institutions to consider the costs implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.[5] Mr Kubayi for the respondents before me argued that financially distressed people in the position of the respondents should not have to litigate in the High Court in relation to their sectional title units. Apart from this argument being contrary to *Thobejane*, the respondents have not placed sufficient, if any, evidence before the court to enable me to decide whether financially distressed persons typically in the position of the respondents are worse off if an applicant approaches the High Court to declare section title units specially executable. Sutherland AJA in *Thobejane* warned against the court making findings based upon an appeal to constitutional values in abstract[6] and upon generalised and speculative conclusions with no proper evidential foundation.[7]

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[4] See, for example, para 42.

[5] At para 88(3).

[6] At para 60.

[7] At para 14.

11. Applicant's counsel specifically drew my attention to paragraph 48 of *Thobejane* where the court found favour with the submissions made by the financial institutions as applicants in those matters that High Court proceedings had the benefits of judges, rather than magistrates, overseeing the process of execution that inevitably follows a judgment on a mortgage bond which is an inherently complex decision-making process. My attention was also directed to paragraph 61 of the judgment where Sutherland AJA recognised that an appropriate question to pose, in relation to foreclosure matters as a prime example, was whether such a drastic an event as a repossession of a person's home ought not, as a matter of policy, to enjoy the scrutiny of the High Court rather than the magistrates' court.

12. If the issue whether the High Court is to declare property specially executable pursuant to judgments granted in the magistrates' courts is framed from the perspective of whether this court has jurisdiction, and if so, whether it can decline to exercise that jurisdiction as there is concurrent jurisdiction in the magistrates' court, then *Thobejane* does present a formidable obstacle to this court declining to do so. But upon reflection, that is the incorrect perspective from which to approach the issue. It is not so much whether this court has jurisdiction, which, as will appear below, I accept that it does but rather whether the applicant has made out a case why this court should grant the declaratory relief that he seeks, rather than the magistrates' court.

13. Nothing is said by the applicant in his affidavits why the High Court has been approached seeking that the units be declared specially executable rather than continuing with the execution proceedings already initiated in the magistrates' court. The Magistrate's Court Rules expressly provide for residential immovable property to be declared executable in a manner substantially the same to that provided for in the High Court.[8]

14. There is no statutory provision that regulates whether the High Court can declare property specially executable pursuant to orders granted in the magistrates' courts. A consideration of the case law recognises that a court can enforce a judgment of another court by way of what is known as process-in-aid.[9] So, to put it at its most basic, the High Court does have jurisdiction to enforce another court's judgment.

15. But the enquiry does not end there. Mokgoro J for the Constitutional Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) in paragraph 20 describes process-in-aid as an appropriate remedy whereby a court enforces a judgment of another court which cannot effectively be enforced through its own process, or as a means of securing compliance with its own procedures. The second instance of process-in-aid is not relevant as the applicant is not seeking to enforce a High Court order. But what is relevant is whether the

[8] Magistrates' Court Rule 43A.

[9] See *Bosman v Bredell* 1932 CPD 385.

magistrates' court orders granted in favour of the applicant can be effectively enforced through its own process. [10]

16. The applicant for process-in-aid must make out a case for the court to grant that remedy. Mokgoro J in *Bannatyne* makes it clear in paragraph 21 that process-in-aid is a discretionary remedy, and in paragraph 22 that process-in-aid will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used. Mokgoro J further recognises in paragraphs 22 and 23 that there may be instances where the facts of a particular case justify approaching the High Court for such relief and that it would then be for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court.

17. A typical example is the enforcement of a magistrates' court order by way of contempt proceedings in the High Court, as there are no contempt procedure available in the magistrates' court by way of civil proceedings and where the aggrieved party's remedy when a person is in contempt of a magistrates' court order is to proffer a criminal charge in terms of section 106 of the Magistrate's Court Act, 1944. *Bannatyne* is an example, in the context of enforcing maintenance orders granted by the maintenance court.

[10] *Dreyer* above at para 9.

18. The High Court has also granted process-in-aid declaring property executable pursuant to a magistrates' court order where the Magistrates' Court Act does not allow for a specific type of property to be attached and sold in execution.[11]

19. But what is common to these instances of the High Court assisting by way of process-in-aid is that there was no effective remedy available in the other court.

20. In the present instance, the applicant has not attempted to make out any case in his affidavits why this court has been approached to enforce the magistrates' court orders and why such remedies, which are clearly available, in the magistrates' court are not being used or are ineffective. To the extent that *Bannatyne* expanded the circumstances under which the High Court will grant process-in-aid to also include where there is a good and sufficient reason for the court to do so,[12] as distinct from whether there are effective remedies in the other court, in the present instance the applicant again has not sought to make out a case in his affidavits why

[11] In *Bosman* above the then Supreme Court was approached for process-in-aid to declare executable the judgment debtor's interests in a trust where the then Magistrates' Court Act, 1917 did not allow for that type of property to be executed against. In *Patel v Manika and others* 1969 (3) SA 509 (D) the Supreme Court was approached to declare executable the judgment debtors' interests in a deceased estate where the Magistrates' Court Act, 1944 did not allow for that type of property to be executed against. In *PMB Hardware Wholesalers CC v Yusuf* 2003 (2) SA 73 (N) the High Court was approached to authorise the Sheriff to proceed with execution in relation to a magistrates' court order as the property sought to be attached was the execution debtor's claim against a third party and this did not constitute 'executable property' under the Magistrates' Court Act.

[12] At para 23.

there is good and sufficient reason for this court to enforce the magistrates' court orders. Although applicant's counsel sought to advance reasons during argument why the magistrates' court remedies were ineffective, such as deficiencies or reluctance in the magistrates' courts to grant such orders, these were submissions made from the bar, without any evidence being placed before the court to enable the court to decide whether to grant any process-in-aid.[13] I bear in mind the warning sounded in *Thobejane* that an adequate factual basis must be made out to sustain the submissions that are made.

21. Although the applicant did not launch his applications from the perspective of seeking process-in-aid – it does not appear that the applicant was alive to what he effectively was seeking was a form of process-in-aid and appears to have assumed that the High Court would have no difficulty in enforcing magistrates' courts orders - in my view the basis upon which the High Court can enforce another court's order is by being satisfied that the requirements for granting process-in-aid have been satisfied. It is not a question of the High Court not having jurisdiction or refusing to exercise that jurisdiction, but rather of the applicant not having made out a case for the relief that he seeks. That the applicant did

[13] Contrast to *Bannatyn*e in para 3, where the *amicus curiae* adduced empirical data on the state of the maintenance system in South Africa and its effects on the rights of women and children in seeking effective relief under the Maintenance Act, 1988 and which evidence gave context to the frailties inherent in the functioning of the maintenance system and on the promotion and advancement of gender equality. The failings of the maintenance system and the paramount importance of advancing the interests of children featured centrally in the Constitutional Court's finding in para 31 that there were 'good and sufficient circumstances' why process-in-aid should be afforded by the High Court in enforcing maintenance orders granted in the maintenance courts.

not appreciate that what in effect he was seeking was a form of process-in-aid cannot change what he is required to establish for the court to exercise its discretion in his favour by granting that process of aid.[14]

22. When seen from this perspective, *Thobejane* supports my approach in this judgment rather than presents an obstacle. *Thobejane* makes it clear that the High Court's inherent jurisdiction, including to regulate its own process taking into account the interests of justice as provided for in section 173 of the Constitution, does not create a free-for-all to approach the High Court with whatever disputes may fall within its territorial jurisdiction without regard to what must be established for the court to grant the relief sought. Sutherland AJA in *Thobejane* cautions that:

> "*The inherent jurisdiction of the High Court can only be applied to address a lacuna which, in the absence of judicial intervention, would result in injustice*". [15]

23. In the present instance, there is no lacuna as the magistrates' court rules expressly provide for property to be declared executable by the magistrates' court in exercising its role of judicial oversight over execution against residential immovable property.[16] I find that this court cannot rely on an inherent jurisdiction as a basis to enforce magistrates' court orders,

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[14] The applicant in *Dreyer* above similarly did not appear to appreciate that he was seeking a form of process-in-aid and so was required to satisfy the requirements for that relief: see para 10 and 11.

[15] Paragraph 53.

[16] Magistrates' Court Rule 43A.

as applicant's counsel submitted I should, without the substantive requirements of issuing process-in-aid having been satisfied.

24. Sutherland AJA in *Thobejane* also emphasises the right of an applicant or plaintiff as *dominus litis* to choose whichever forum may have jurisdiction and that he or she cannot be faulted for exercising that election because another court has concurrent jurisdiction, and should rather have instituted proceedings in that other court.[17] In this instance, the applicant made the election to institute proceedings in the magistrates' court and having done so cannot complain that he is required to follow through in his chosen forum.[18]

25. In the circumstances, I accept that this court does have jurisdiction and so I do not decline to entertain the applications on the basis that there is no jurisdiction. What I do find is that the applicant has failed to establish a case in the affidavits why this court should through process-in-aid grant an order declaring immovable property specially executable based upon the orders of another court.

26. My finding is therefore dispositive of the applications, and they are to be dismissed.

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[17] Para 25.

[18] *Giant Properties (Pty) Limited v Govender* 2004 CLR 27 (W) at 30-31, citing *Herbstein and Van Winsen The Civil Practice of the Supreme Court in South Africa,* 4th edition (1997), at p 37. The same passage appears in the fifth edition (2009) at p 44.

27. In the circumstances, I do not propose dealing in detail with the second issue that arose. That issue was whether Uniform Rule 46A, which has various requirements that an applicant must satisfy in seeking an order to declare residential immovable property specially executable, only applies where that residential immovable property is a primary residence. The difficulty that presented itself was that the applicant had failed to provide evidence of the market value of the units and of the amount owing to the local authority for rates and other dues, as required in terms of Uniform Rule 46A(5)(a) and (c). The applicant also failed to make out a case on the affidavits why the reserve price that his counsel suggested of R80 000 was an appropriate reserve price. The applicant's counsel sought to address these deficiencies by submitting that the requirements of Uniform Rule 46A(5) and the setting of a reserve price in terms of Uniform Rule 46A(9) only applied where the property sought to be declared executable was a primary residence. In this instance, the applicant contended that the units were not the primary residences of the respondents as the judgment debtors, which the respondents disputed, and therefore Uniform Rule 46A did not apply.

28. In my view, Uniform Rule 46A on its plain wording applies to execution against all residential immovable properties, save where appears otherwise. Where specific provision is made for additional requirements to be satisfied when the property sought to be executed against is a primary residence, this is expressly provided for in the rule, such as in subrule (2)(b) where it is expressly stated that a court shall not authorise

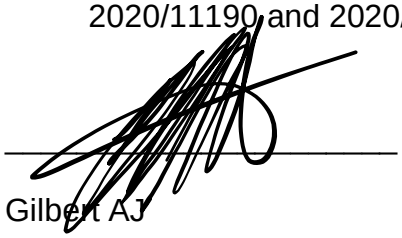
the execution against immovable property which is a primary residence of a judgment debtor unless the court, having considered all relevant factors, considers the execution on such property is warranted. In contrast, none of the other subrules under Uniform Rule 46A (other than subrule (8)(d)) make mention of primary residence. To the contrary, there are references to "*every*" notice of application to declare residential of immovable property, without distinction, being required to comply with various requirements, including in subrules (3) and (5).

29. I see nothing new in Uniform Rule 46A which limits its application in its entirety only to execution against primary residences. Rather, I see Uniform Rule 46A seeking to protect the interests of owners of all residential properties and that where the residential property is also a primary residence, further safeguards are provided. Where the immovable property is not residential property (such as commercial or industrial property), then Uniform Rule 46 alone, rather than Uniform Rule 46A also, would apply and which does not require the same level of judicial oversight as required for residential properties. That there is a range of residential properties that may fall within the ambit of the more restrictive Uniform Rule 46A, ranging from a person's primary residence through to a holiday home or investment residential property, can be addressed on a case by case basis in the exercise by the court of its discretion in discharging its judicial oversight under the rule, rather than finding that the rule does not apply at all to some types of residential property.

30. Assuming in favour of the applicant that the units were not primary residences, the applicant nevertheless has not complied with the requirements of Uniform Rule 46A. Had I not dismissed the applications as no case has been made out for affording the applicant process-in aid, I would not have granted the orders in any event. Whether or not I would then have dismissed the applications, or postponed the applications to afford the applicant an opportunity to supplement his papers to comply with Uniform Rule 46A I need not decide.

31. Although the applications are to be dismissed based upon an issue raised by the court *mero motu*, that does not deprive the respondents of costs in their favour in having resisted the grant of the orders.[19]

32. In the circumstances, each of the applications under case numbers 2020/11190 and 2020/11191 is dismissed, with costs.



Gilbert AJ

Date of hearing:	18 August 2021
Date of judgment:	2 September 2021
Counsel for the applicant in both matters:	Ms N Lombard
Instructed by:	Schüler Heerschop Pienaar Attorneys,

[19] *Charugo Development Co (Pty) Limited v Maree N.O.* 1973 (3) SA 759 (AD) at 764G/H.

Roodepoort

For the opposing respondents in both matters:	Mr N.E. Kubayi (Attorney)
Instructed by:	Noveni Eddy Kubayi Inc., Alberton North