

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) Reportable **NO**
(2) Of interest to other Judges
NO
(3) Revised

Date: 25/01/2022


Signature



CASE NO: A3043/2021

In the matter between:

**THE BODY CORPORATE OF LE GRANDE
BERNARD SECTIONAL SCHEME**

Appellant

And

RIENET VAN DER LINDE

Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introductory background

1. The appellant (applicant *a quo*) brought an application in the Randburg Magistrates court in terms of s 66(1) of Act 32 of 44 ('the Act') read with Rule 43A¹ for an order, *inter alia*, declaring an immovable residential property

¹ Rule 43 A of the rules regulating proceedings in the Magistrates Courts.

belonging to the respondent specially executable ('the application'). The application was not opposed by the respondent (defendant *a quo*).

2. On 6 April 2021, the presiding magistrate dismissed the application, with no order as to costs. This appeal lies against the whole of the judgment of the court below.
3. The appellant is the Body Corporate of Le Grande Bernard Sectional Scheme, a sectional title scheme established in terms of the Sectional Titles Schemes Management Act, 8 of 2011. The respondent is one of its members and the owner of an immovable residential property which forms part of Le Grande Bernard Sectional Scheme run and controlled by the appellant.
4. The application was brought in consequence of the Sheriff having issued a *nulla bona* return pursuant to an unsuccessful attempt by the appellant to execute against the movable property of the respondent after obtaining default judgment against the respondent in respect of unpaid arrear levies and related charges owing to the appellant.
5. The record reveals that two separate judgments (by default) were obtained in favour of the appellant against the respondent pursuant to two separate actions being instituted for payment of arrear levies and charges. Neither action was defended by the respondent. The first judgment, which was obtained on 22 November 2018, was for payment of the sum of R13,215.67. The second judgment, which was obtained on 15 July 2019, was for payment of the sum of R15,710.30, with the aggregate total outstanding judgment debt amounting to R28,925.97.
6. At the time that execution against the movable property of the respondent was attempted on 19 March 2019 by the Sheriff, the respondent was residing at the immovable property described as section 65 (being door 65)

Le Grand Bernard, 40 Ballyclare Drive Bryanston, Sandton-North ('the property'). On that occasion, when payment of the first judgment debt was demanded by the Sheriff, the respondent indicated to the Sheriff that she had no money or disposable property with which to satisfy the judgment debt. However, by the time that the application in question was served by the sheriff at the property on 12 January 2021, the Sheriff's return indicates that the property was found to be '*vacated and empty.*'

7. The application was brought by the appellant in a further attempt to recover monies due and owing to it by the respondent and, at the very least, to avoid further prejudice being suffered by other members of the appellant having to carry the cost of the respondent's ongoing failure to meet her monthly obligations to the body corporate. Unpaid levies had continued to accrue after the grant of default judgment and by the time the application was brought, the amount of unpaid levies owing by the respondent exceeded an amount of R80,000.00. The appellant alleged in its founding papers that it has a duty to protect and act in the best interest of its collective members apropos 'the maintenance and up-keeping of the building known as Body Corporate of the Le Grande Bernard Sectional Scheme', same being a statutory duty in terms of section 3 of the Sectional Titles Schemes Management Act 8 of 2011 and that 'it is to the extreme detriment and prejudice of the Applicant and its members when one member fails to make her *pro rata* contribution to the levies, contributions and other charges'.
8. The papers reveal that the property was bonded to Nedbank. At the time of the application, the bond liability amounted to R1 609 115.11, whilst the outstanding liability to COJ was R28 019.86. The market value of the property was approximately R1,450 000.00 with an expected high of R1.74 million and an expected low of R1.32 million.

Judgment of court below

9. At the conclusion of oral argument presented on behalf of the appellant at the hearing of the application, the learned magistrate provided the following reason for dismissing the application: *"After having read the papers and after having gone through the statement from the bondholder, the statement from the City of Johannesburg and having regard to the amount of the [respondent's] debt, ...the property, if sold, will never be able to cover the debt. I do not think it will even cover the outstanding bond let alone the City of Johannesburg's fees. For those reasons the application is dismissed. I am making no order as to cost.(sic)"*
10. The presiding magistrate later provided written reasons in terms of Rule 51(1) for why she dismissed the application. These included that:
 - 10.1. The court record reflected that the property will sell at a loss, demonstrated mathematically, as follows:

Value of property per affidavit and annexures:	R1,450 000.00
Minus outstanding bond (per annexure 'NC1')	R1 609 115.11
Minus outstanding debt to COJ	<u>R28 019.86</u>
Equals:	- R187 134.97
 - 10.2. She (magistrate) understood the purpose of a Rule 43A application to be 'a step in the successful recovery of a debt through the sale of an immovable property';
 - 10.3. 'The mathematical calculation set out above demonstrates empirically that this will not be achieved.'

Issue on appeal

11. The issue for consideration in the appeal is whether, given the factual circumstances of the case, it was permissible for the learned magistrate to refuse to grant the application solely on the basis that she was of the opinion that the sale of the property in execution would not result in effective recovery of debts owed to the preferent creditor (Nedbank), the appellant and the City of Johannesburg.
12. The applicant's argument is essentially that (i) the recoverability of the debt owed to the preferent creditor and (ii) the amount of the proceeds to be recovered at a sale in execution, are issues to be considered at the stage of the sale in execution and not when adjudicating the s 66 application. Similarly, so the argument went, Rule 43A contains no requirement 'that the court must consider the prospect of recoverability as a deciding factor in adjudicating the application', rather, it is merely one of several factors to be taken into account by the court when considering whether a reserve price should be set.

Discussion

13. Rule 43A of the Magistrates Court rules deals with execution against residential immovable property. It applies whenever an execution creditor seeks to execute against the residential immovable property or the primary residence of a judgment debtor. Rule 43 on the other hand deals with execution against immovable property other than the residential immovable property or primary residence of a judgment debtor and provides that save where immovable property has been declared specially executable, execution shall not issue against immovable property until the movable property of the judgment debtor has first been excused and found to be insufficient to satisfy the judgment or order of court or such immovable property has been declared to be specially executable by the court.

14. The following sub-rules of Rule 43A and Rule 43 and sub-sections 1 and 2 of section 66 of the Magistrates' Courts Act 32 of 1944, are relevant to the issue on appeal:

'RULE 43A EXECUTION AGAINST RESIDENTIAL IMMOVABLE PROPERTY

(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2)(a) A court considering an application under this rule must —

- (i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
- (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar or clerk of the court shall not issue a warrant of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

(5) Every application shall be supported by the following documents, where applicable, evidencing —

- (a) the market value of the immovable property;
- (b) the local authority valuation of the immovable property;
- (c) the amounts owing on mortgage bonds registered over the immovable property;
- (d) the amount owing to the local authority as rates and other dues;
- (e) the amounts owing to a body corporate as levies; and
- (f) any other factor which may be necessary to enable the court to give effect to subrule (8):

Provided that the court may call for any other document which it considers necessary.

(8) A court considering an application under this rule may —

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;

(b) order the furnishing by —

- (i) a municipality of rates due to it by the judgment debtor; or
- (ii) a body corporate of levies due to it by the judgment debtor;

(c) on good cause shown, condone —

- (i) failure to provide any document referred to in subrule (5); or
- (ii) delivery of an affidavit outside the period prescribed in subrule (6)(d);

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit;

(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or

(i) make any other appropriate order.

(9)(a) In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.

(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account —

- (i) the market value of the immovable property;
- (ii) the amount owing as rates or levies;
- (iii) the amounts owing on registered mortgage bonds;
- (iv) any equity which may be realised between the reserve price and the market value of the property;
- (v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);
- (vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;
- (vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;
- (viii) any prejudice which any party may suffer if the reserve price is not achieved; and
- (ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

(c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph (b) of this subrule and its powers under this rule, order how execution is to proceed.

(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain —

- (i) the date, time and place at which the auction sale was conducted;
- (ii) the names, identity numbers and contact details of the persons who participated in the auction;
- (iii) the highest bid or offer made; and

(iv) any other relevant factor which may assist the court in performing its function in paragraph (c).

(e) The court may, after considering the factors in paragraph (d) and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.

RULE 43 EXECUTION AGAINST IMMOVABLE PROPERTY

(1)(a) Subject to the provisions of rule 43A, no warrant of execution against the immovable property of any judgment debtor shall be issued unless —

- (i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the warrant; or
- (ii) such immovable property has been declared to be specially executable by the court.

(5) Subject to rule 43A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless —

(a) the execution creditor has caused notice of the intended sale, corresponding substantially with Form 34 of Annexure 1, to be served upon —

- (i) preferent creditors personally;
- (ii) the local authority, if the property is rated; and
- (iii) the body corporate, if the property is a sectional title unit;

calling upon the aforesaid entities to stipulate within 10 days of a date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve, and has provided proof to the sheriff that such entities have so stipulated or agreed, or

(b) subject to the provisions of section 66(2)(b) of the Act, the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice.

SECTION 66 MANNER OF EXECUTION

(1)(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.

(2) No immovable property which is subject to any claim preferent to that of the judgment creditor shall be sold in execution unless—

- (a) the judgment creditor has caused such notice in writing of the intended sale in execution to be served personally upon the preferent creditor as may be prescribed by the rules; or
- (b) the magistrate or an additional or assistant magistrate of the district in which the property is situate has upon the application of the judgment creditor and after enquiry into the circumstances of the case, directed what steps shall be taken to bring the intended sale to the notice of the preferent creditor, and those steps have been carried out, and unless
- (c) the proceeds of the sale are sufficient to satisfy the claim of such preferent creditor, in full; or
- (d) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim.’ (emphasis added)

15. What can be gleaned from the provisions quoted above is that where execution is sought to be levied against the residential immovable property of a judgment debtor, a warrant of execution cannot be issued without judicial oversight and an order obtained from court permitting such execution. In deciding whether or not to order execution, a court is required to have regard to all relevant circumstances.² Examples of such circumstances are listed by the authors, Jones and Buckle,³ which include whether the rules of court have been complied with; whether there are other reasonable ways in which the judgment debt can be paid; whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt; the circumstances in which the judgment debt was incurred; attempts made by the judgment debtor to pay off the debt; the financial position of the parties; the amount of the judgment debt; whether the judgment debtor is employed or has a source of income to pay off the debt; or any other factor as may be relevant to the particular case.⁴

² Further considerations arise in the case of a primary residence, as outlined in Rule 43A (2)(a)(ii). In the case of immovable property not comprising residential immovable property or a primary residence of the debtor, execution against movables is a prerequisite in terms of Rule 43(1)(a)(i). In terms of s66(1)(a) execution against the movable property of the debtor is first required and only if no sufficient movable property is found with which to satisfy the judgment debt, is execution against the immovable property of the judgment debtor in satisfaction of a judgment debt enforceable.

³ Jones and Buckle ‘The Civil Practice of the Magistrates’ Courts in South Africa (Volume I and II) in their commentary on s 66 at p 454

⁴ The Constitutional Court confirmed these examples of relevant circumstances in *Gudwana v Steko Development* 2011 (3) SA 608 (CC) at 626E.

16. In *Kgomo*,⁵ a full bench of this division had occasion to consider the provisions of Rule 43A in so far as it distinguishes between residential immovable property which constitutes the primary residence of the judgment debtor and residential property which does not. The court held that the purpose of Rule 43A *'is to ensure that while a judgment debtor is obliged to liquidate its (sic) debt and a court is required to assist a judgment creditor from (sic) recovering its monies, this endeavour is undertaken in a manner that, as far as it is possible, the primary residence of the judgment debtor remains protected. It is only to be utilised to relinquish the debt when all other avenues have been exhausted. In other words, Rule 43A is there to protect the primary residence of the judgment debtor, it is not there to assist it from avoiding its legal duty to relinquish the debt. The protection is over the primary residence and not any other residence of the judgment debtor.'* (emphasis added)
17. It is apparent from a reading of the record that the learned magistrate did not undertake the peremptory enquiry contemplated in Rule 43A(2)(a) before dismissing the application. There is nothing in the judgment of the court below (or the magistrate's written reasons) that indicates that she endeavoured to establish at the hearing of the application whether the property in question constituted the respondent's primary residence or not. Therein the court below erred. The court record *prima facie* indicates that the property was not the primary residence of the respondent at the time the application was adjudicated, although it comprised residential immovable property as envisaged in rule 43A. Furthermore, the property was hypothecated to Nedbank (bondholder) who held a preferent claim to that of the body corporate as judgment creditor.⁶

⁵ *The Body Corporate of Bushmill Sectional Title Scheme v Kgomo*, Case No. 3039/2020, delivered on 28 May 2021 per Vally J, an unreported judgment of a full bench in this division.

⁶ See: *Firststrand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA).

18. It further appears from the judgment and the written reasons provided by the learned magistrate that her sole reason for dismissing the application was that she considered that the proceeds of the intended sale in execution would not be sufficient to satisfy the preferent creditor's claim in full (as contemplated in s 66(2)(c) of the Act) without, however, considering the provisions of s 66(1)(a) or 66(2)(d) of the Act. The facts established that a court had previously given judgment in favour of the appellant for the payment of money by the respondent, which money had not been paid to the appellant. No sufficient movable property was found by the Sheriff with which to satisfy the judgment debt and the money judgment was therefore enforceable against the respondent's property, subject to the court's authorisation, in terms of s 66(1)(a). In my view, the learned magistrate put the proverbial cart before the horse by concluding that the intended sale in execution would not realise sufficient proceeds to pay the respondent's indebtedness to the preferent creditor (and other creditors such as COJ and the Body Corporate). I say this for reasons that follow.
19. In *Firststrand Bank*,⁷ the Supreme Court of Appeal considered the interaction between s 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 (STA)⁸ and s 66(2) of the Act. The body corporate applied to the High Court for an order declaring that the bank, as bondholder over the unit in question, did not enjoy a claim preferent to the body corporate's claim as judgment creditor in respect of arrear levies and related costs and that the provisions of s 66(2) of the Act were inapplicable. In addition, it sought an order directing the sheriff to transfer to and register the unit in the name of the purchaser who had purchased it at a sale in execution on 12 February 2000. The issue for

⁷ *Firststrand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA), para 26 & 28.

⁸ Section 15B(3)(b) provides that the Registrar of Deeds shall not register a transfer of a unit or of an undivided share therein unless there is produced a clearance certificate from the local authority that all rates and moneys due to such local authority have been paid.

consideration on appeal was whether the respondent's claim as judgment creditor in respect of arrear levies and related costs due by an owner of a dwelling unit in a sectional title development was *preferent* to the claim of the appellant as holder of a mortgage bond over the unit in question. The appeal court reasoned that '*The practical effect of the statute [STA] is that, assuming the availability of funds, a body corporate will be paid before transfer of immovable property is effected. A reasonable mortgagee and body corporate might arrive at an accommodation where there are insufficient funds available to cover the total of the debts owing to both parties - but neither is obliged in law to do so.*' (own emphasis) The Supreme Court of Appeal held that 'the bank's claim as mortgagee is preferent in terms of the provisions of s 66(2) of the MC Act. The body corporate consequently did not have the right to sell the unit in question in execution without reference to the security afforded to the bank by the mortgage bond.

20. Rule 66(2)(a) provides for a notice to be given to the preferent creditor 'as prescribed by the rules'. The relevant rule is 43(5)(a), which requires a notice corresponding substantially with Form 34 of Annexure 1 to be served, *inter alia*, upon the preferent creditor and the local authority. Form 34 informs the said part/ies, amongst others, of the fact that the immovable property was laid under judicial attachment and of the date of the scheduled sale in execution. It further calls upon the party/ies to stipulate a reasonable reserve price or to agree in writing to a sale without reserve. In other words, the notice comes after or follows upon judicial authorisation of a sale in execution. It is in this context that the body corporate has to have reference to the security afforded to the bank by the mortgage bond. Likewise, registration of transfer cannot be effected after a sale in execution without the preferent creditor's claim being satisfied in full or the preferent creditor

having agreed to compromise its claim or 'arrive at an accommodation' that may possibly allow for recovery of the body corporate/judgment creditor's claim.

21. In *Demetriou*,⁹ the Gauteng High Court applied the dictum in the Firstrand Bank case¹⁰ to the effect that immovable property that was subject to any claim preferent to that of the judgment creditor should not be sold unless the requirements listed in section 66(2)(a)-(d) were met, and held that where the purchase consideration at an intended sale was not sufficient to cover the preferent creditor's debt, the judgment creditor was obliged in terms of s 66(2) to seek the written consent of preferent creditor for the conditions of sale to be valid and binding. If such consent is refused, the property cannot be legally sold. The court reasoned that the provisions of s 66(2) are to the effect that, for a judgment creditor who attached immovable property that is subject to a preferent claim of another party to sell such property, he or she must:

- (i) Follow the steps in either s 66(2)(a) or (b) in notifying the preferent creditor of the intended sale;
- (ii) Ensure that the property is sold for an amount out of which the debt owing to the preferent creditor will be paid in full.
- (iii) Where, for some or another reason, the property cannot attract an amount that will settle the preferent creditor's claim in full, the judgment creditor cannot sell the property without obtaining the written consent of the preferent creditor.

⁹ *Terence Christopher Demetriou and Another v Sheriff of the Magistrate's Court: Alberton and Others* (GSJ) (unreported judgment no 2012/43269) (26 April 2013).

¹⁰ Cited in fn 6 above.

22. The upshot of the Demetriou judgment is that where an auction sale of an immovable property is concerned in terms of the Act, practitioners should take the necessary precautions to ensure that either a reserve price is obtained from a preferent creditor, if any, before a sale in execution is proceeded with or that consent is obtained from the preferent creditor authorising a sale in execution at a price lower than the indebtedness owed to the relevant preferent creditor.¹¹
23. I agree with the appellant that the presiding magistrate erred in dismissing the application solely on the basis that she was of the opinion that the sale of the property in execution would not result in effective recovery of debts owed to the preferent creditor (Nedbank), (including the appellant and COJ) when regard is had to the judgments mentioned above, which acknowledge that the judgment creditor may well negotiate and 'reach an accommodation' as to the amount of proceeds to be recovered at the sale in execution for purposes of determining the recoverability of the preferent creditor's claim (either in full or for a lesser amount) and hence the possibility of recoverability of the judgment creditor's claim before registration of transfer. This may also include negotiation between affected parties and a solution to the impasse reached even to the extent that certain rights are consensually waived insofar as recoverability is concerned.¹² In doing so, the presiding magistrate tied the proverbial hands of the appellant in so far as: (i) its rights of enforcing a judgment granted in its favour and any prospect of recovery of the judgment debt were concerned; (ii) not allowing the appellant to utilise the full ambit of its remedies and concomitantly

¹¹ See: "Protecting preferent creditors: Setting a reserve or obtaining consent?" De Rebus, December 2013:20 [2013] DEREBUS 242 by RJ Bouwer, where the author pointed out that '.

¹² See: *Willow Waters Homeowners Association (Pty) Ltd v Koka N.O. and Others* 2015 (5) SA 304 (SCA) at paras 24-26;

Absa Bank Limited v Mokebe; *Absa Bank Limited v Kobe*; *Absa Bank Limited v Vokwani*; *Standard Bank of South Africa Limited v Colombick and Another* (2018/00612; 2017/48091; 2018/1459; 2017/35579) [2018] ZAGPJHC 487 (12 September 2018), para 62 ('Mokebe').

unjustifiably limiting the rights of the appellant; and (iii) allowing a situation whereby a recalcitrant debtor will be able to remain in occupation (or retain ownership of his or her immovable property that is not a primary, ad infinitum) despite not paying the judgment debt, or any accumulated arrear monthly liabilities owed to the body corporate or without the appellant being afforded recourse, if circumstances require, to the provisions of Rule 43A(9)(e).

24. At the risk of repetition, as appears from the record, the presiding magistrate failed to establish whether or not the property was the primary residence of the respondent and failed entirely to consider the provisions of Rule 43A(9)(a) and (b), which provisions are peremptory.¹³ Whether or not the court below considered or applied the provisions of Rule 43A(8) remains unclear, as the judgment makes no mention of the factors listed therein.
25. The principles elucidated in *Mokebe supra* are in my view equally applicable to applications brought in the Magistrates' court in terms of s 66 of the Act read with Rule 43A, as in *casu*. Having regard to *Mokebe*, the following guiding principles are relevant to applications in terms of s 66 of the Act read with Rule 43A:
 - (i) The court is obliged to set a reserve price, after considering the provisions of Rule 43A(9)(a) and Rule 43A(9)(b), in respect of an application in terms of in terms of Section 66(1) of the Act, where the

¹³ In terms of Rule 43A(9)(a) the court *must* consider whether a reserve price is to be set. Relevant factors for determining whether a reserve price is to be set are outlined in Rule 43A(9)(b) read with further guiding principles enunciated in *Mokebe* (cited in fn 12 above). In *Mokebe*, the Full Court in this division acknowledged that " *the setting of a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property, but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property....a reserve price should be set in all matters where facts indicate it...*" (own emphasis). *Mokebe* dealt with applications for leave to execute against the primary residence of a debtor under the provisions of the Uniform Rules of Court, applicable in the High Court.

facts of the matter so require and where the property to be declared specially executable is the primary residence of the debtor. By parity of reasoning, the court may grant an application in terms of Section 66(1) of the Act read with Rule 43A without setting a reserve price where the property sought to be declared specially executable comprises residential immovable property or the primary residence of the judgment debtor, where the facts so require;

- (ii) Where a reserve price to be set exceeds the value of the property to be declared specially executable, such as to denude any equity which may be realised between the reserve price and the market value of the property (such factor being relevant to the decision as to whether or not a reserve price should be set) the court may still grant the application where other considerations relevant to the grant of an order declaring the property specially executable (alluded to earlier in the judgment) warrant the grant of such an order.¹⁴

26. In the circumstances and for all the reasons given, the appeal should succeed. Counsel for the appellant agreed or conceded at the hearing that the matter should be remitted to the Magistrates Court for proper reconsideration of the application on its facts in accordance with the peremptory provisions of Rule 43A read with s 66 of the Act as outlined in this judgment.

27. The general rule is that costs follow the result. Although the respondent chose not to oppose the appeal, the appeal process is an extension of the recovery process, being part of the enforcement of the judgment debt.¹⁵ The

¹⁴ One such factor being whether there is no other satisfactory means of satisfying the judgment debt.

¹⁵ *Stewarts and Lloyds Holdings (Pty) Ltd v Solid Steel Construction (Pty) Ltd*, Case No. A3070/2021, par 25, an unreported decision of the Full Bench in this Division, delivered on 10 November 2021.

appellant was impelled by a failure on the part of the court below to correctly apply the peremptory provisions of Rule 43A and established legal principles in relation to execution against immovable residential property in order to vindicate its right to a remedy provided in law. The appellant should therefore be entitled to its costs.

28. In the circumstances, the following order is granted:

ORDER:

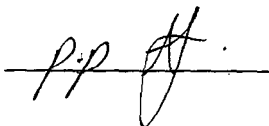
1. The appeal is upheld with costs.
2. The order of the court below dismissing the application for leave to execute against the immovable property of the respondent is set aside and replaced with the following order:

“ The application brought by the appellant for leave to execute against the immovable property described as section 65 (being door 65) Le Grand Bernard, 40 Ballyclare Drive Bryanston, Sandton-North is referred back to the Magistrates Court for reconsideration in accordance with the principles outlined in this judgment.”



**A. MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

I agree



**L.B VUMA
ACTING JUDGE OF THE HIGH COURT,**

GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 2 November 2021
Judgment delivered 25 January 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 10 November 2021.

APPEARANCES:

Counsel for Appellant: Mr S Mc Turk
Attorneys for Appellant: Otto Krause Inc Attorneys

No appearance for the Respondent.