

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/11/2016

CASE NO.: 31811/2002

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

11 November 2016 R. B. M. M.

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT

and

SEGOGOANE NAPHTALI JOHN LETLHAKA

RESPONDENT

EX TEMPORE JUDGMENT

NOBANDA AJ:

INTRODUCTION

[1.] The Applicant which is a bank obtained default judgment against the Respondent on 23 January 2003 of a loan agreement in the amount of R 150 263.89. The loan agreement related to the purchase of an immovable property by the Respondent, to wit, **ERF 520 SOSHANGUVE FF TOWNSHIP, REGISTRATION DIVISION: J.R. PROVINCE OF GAUTENG MEASURING 691 SQUARE METERS, HELF BY DEED TRANSFER T107375/2000** ("the property").

As security for the debt, the Applicant caused a mortgage bond to be registered over the property.

[2.] The Applicant has now brought an application in terms of Rule 46 (1) (a) (ii) of the Uniform Rules for the property to be declared specially executable. The Respondent is opposing the application.

THE APPLICATION

[3.] In its application the Applicant alleges that the amount at the time the application was brought, that was March 2016, the arrears had increased to R226 234.49 evidencing arrear instalments in excess of 74 months. At the time of bringing this application, the arrear instalments were in excess of 114 months; that is approximately 9 years 8 months.

[4.] In his opposing affidavit, the Respondent gives a long history of his employment and/or lack thereof with different companies. What

however is of relevance is that from at least 2004 until 2010, the Respondent was practising as an attorney. At some stage during this period, the Respondent ran his own practise under the name and style SNJ Letlhaka Attorneys. Notwithstanding, the Respondent never even made a single payment towards the arrears on his mortgage loan account with the Applicant to date.

[5.] Furthermore, the Respondent, save for merely stating that the property sought to be executed upon is his primary home and he lives there with his 3 children, no proposal or anything else is said about paying his arrears. It appears the Respondent merely want to stay in the property free of charge.

[6.] Rule 46 (1) provides:

- (a) *No writ of execution against the immovable property of any judgment debtor shall issue until –*
 - (i) *a return shall have been made of any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or*
 - (ii) *such immovable property shall have been declared specially executable by the court or, in the case of a 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, no writ shall have been issued unless the court, having considered all relevant circumstances, orders execution against such property.”

The purpose of the Rule is to give the court judicial oversight over such matters prior to declaring such properties specially executable¹. The court is also required to balance the interests of the debtor and those of the creditor.

[7.] In doing so, the court has to *inter alia*, consider the proportionality of prejudice the creditor might suffer if execution was refused as against the prejudice the debtor would suffer if such an order is granted.²

[8.] The Applicant is a bank whose business is to grant loans to consumers for profit. The banks are the backbone and integral part of the economy of any country. Hence the court has to balance its interests against those of the debtor.

[9.] The court’s oversight can only be exercised if the judgment debtor advances facts and contentions that the court has to take into account in deciding such applications. For the court to make a determination, it has to consider all the relevant facts before it particularly where the debtor, like in *casu*, has had the opportunity to place facts before court.

¹ *First Rand Bank v Folscher* 2011 (4) SA 314 (GNP) p318

² *ibid*


[10.] On the facts of this matter, the Respondent has failed to show cause why the property should not be declared specially executable. As stated above, other than stating that the property is his primary home which he occupies with his 3 children, no further information was placed before court. What is of more concern is that the Respondent to date has not attempted to pay any amount towards the loan agreement or arrears since January 2003. Neither is there any proposal placed in his affidavit on how he intends to pay the arrears.

[11.] The Applicant alleges that the amount now owing as at 15 April 2016 is R492 950.85. The property has been valued at R500 000.00. How the Applicant came to the amount now owing is not clear. Be that as it may be, the Respondent appears not to be willing to pay the Applicant any amount whatsoever towards his debt as evidenced by his conduct set out above.

[12.] In the circumstances, the prejudice that the Applicant will suffer if the order is not granted far outweighs that of the Respondent. It does not appear that the Respondent has any intention of paying the arrears or his debt towards the Applicant ever. As stated above, it has been more than 9 years since the Respondent made any payment towards his loan agreement with the Applicant.

[13.] In the premises I make the following order:

I make an order in terms of the Draft marked "X".



P.L NOBANDA

Acting Judge of the High Court, Pretoria