IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A714/2014

Date: 7 March 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

7/3/2016 .....
DATE ~~SIGNATURE~~

In the matter between:

NEDBANK LIMITED

APPELLANT

And

MASHEGO FREDERICK MALEKA

FIRST RESPONDENT

ZANELE ELLEN MALEKA

SECOND RESPONDENT

JUDGMENT

PRETORIUS J,

(1) In this appeal to the Full Bench of this division the appellant requests the court to set aside the judgment and order of Kubushi J granted on 3 July 2013.

(2) The respondents sought an order in the court *a quo* that the sale in execution in respect of an immovable property be set aside and that the subsequent transfer of the property be set aside.

(3) An application for condonation and reinstatement of the appeal was heard simultaneously with the appeal. The court found, after the respondents had conceded, that the explanation by the applicant for the late launching of the appeal had been adequate and granted condonation.

FACTS:

(4) During 2003. 2004 and 2007 the applicant and the respondents entered into three separate loan agreements in terms of which the respondents lent money from the appellant and the agreement was secured by three mortgage bonds which were registered over a certain immovable property.

(5) Due to non-payment of the bond, action was instituted against the respondents in the High Court on 15 May 2008. John Triblehorn Attorneys entered appearance to defend the main action on behalf of the respondents. An application for summary judgment was enrolled for 13 August 2008. On 16 July 2008 the same attorneys forwarded a letter to the appellant's attorney indicating that the respondents did not

have any defence to the action and therefore summary judgment should be granted, which was duly done. The property was declared executable at the time of summary judgment. A writ of attachment was served on the respondents on 26 September 2008. A sale in execution was scheduled for 30 October 2008, which was subsequently cancelled as the respondents proceeded to make nominal payments.

(6) A second sale in execution was scheduled for 25 November 2010, as the respondents had once more failed to bring the payments up to date. On 24 November 2010 the sale was once more cancelled as the respondents had signed a Nedbank Assisted Sales Agreement. The terms were that the respondents granted the appellant a mandate to sell the property in order to settle their indebtedness through an estate agent. The respondents acknowledged that they were familiar with their rights in terms of the provisions of the National Credit Act No. 34 of 2005. The mandate would be in full force for 100 days from the date that the mandate had been signed and would terminate after 100 days.

(7) The 100 days expired and the respondents failed to extend the mandate, although they had been requested by the appellant to do so. Subsequent to this failure the account was withdrawn from the Nedbank Assisted Sales option.

(8) A sale in execution was arranged for 24 February 2012 and the respondents were informed of this sale on 23 February 2012. No payment was forthcoming from the respondents and the property was

sold and on 6 June 2012 the property was registered in the name of the buyer.

(9) The respondents were at all times, even before summary judgment had been granted, represented by legal representatives; they granted the appellant a mandate to sell their immovable property, they did not launch a rescission of judgment application; they did not provide any evidence as to their financial means or any impossibility to obtain alternative housing. The only reference in this regard is in the founding affidavit where the respondents alleged *"...the property is the only registered property that the applicants have and they may be homeless together with their school-going minor children..."*.

(10) No application for rescission of the summary judgment had been launched at any time. The appellant had scheduled two sales in execution, which had been cancelled, in an endeavour to assist the respondents. There is no explanation in the papers, nor could Mr Malowa for the respondents, explain during argument why no rescission of judgment application was launched at any time.

(11) There is no reason furnished as to why the court when granting the summary judgment would have refused to execute against the immovable property. It is clear that the respondents' attention was drawn to section 26 of the Constitution in the summons and they chose to consent to summary judgment. The respondents' actions showed that they were *ad idem* with the appellant at the time that the property should be sold when they entered into the mandate with Nedbank in

the Nedbank Assisted Sales Agreement. It is clear that the respondents had been legally represented from the outset.

(12) The court *a quo* relied on the decisions of **Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)** and **Menqa and Another v Markom and Others 2008(2) SA 120 (SCA)** when deciding that the warrant of execution should be set aside due to a lack of judicial oversight. The warrant of execution had been granted by the registrar at the time.

(13) This court has to agree with the appellant that the facts in the present matter are distinguishable from these cases, as these cases related to the constitutional invalidity of section 66 of the **Magistrate's Court Act 32 of 1944** and not the provision of Rule 46(1) of the Uniform Rules of this court. The main difference, however, is that in both those cases, warrants of execution were issued after default judgments had been granted, which is not the case in the present instance. Summary judgment was granted by consent and no application for rescission of the judgment has been launched. The respondents agreed to have their property sold through the Nedbank Assisted Sales process.

(14) In **Gundwana v Steko Development CC and Others 2011(3) SA 608 (CC)** at paragraph 65 the court held:

> *"It is declared that it is unconstitutional for a registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules*

of Court, to the extent that this permits the sale in execution of the home of a person."

(15) Therefor the court has to consider all relevant circumstances before authorising the issuing of a warrant of execution against a person's primary residence. This court in a full bench decision in **Firstrand Bank Ltd v Folscher and Another 2011(4) SA 314 (GNP)** at 328H to 329B held:

"The amendment to the rule requires judicial oversight of the execution process against property especially hypothecated, which is the 'primary residence' of the judgment debtor. The protection of s 26(1) of the Constitution is extended to the debtor who may lose what is usually his only home.

The effect of the wording of the amendment and the 'relevant circumstances' that have to be considered by the court will be considered below.

This investigation must be undertaken against the background of the Gundwana decision of the Constitutional Court delivered on 11 April 2011, which declared unconstitutional the practice of allowing the registrar to declare immovable property specially executable when ordering default judgment in terms of rule 31(5), 'to the extent that this permits the sale in execution of the home of a person'. (Our emphasis.) This decision overrules the Mortinson and Saunderson judgments on this point. Its interaction with the amended rule, if any, will be considered

below. ***It is clear, however, that all applications for execution against a specially hypothecated property must henceforth be dealt with by the court.***" (Court's emphasis)

(16) The *dicta* in **Gundwana v Steko (supra)** is applicable in the present case and deals with retrospectivity at paragraphs 57 to 59:

"But what about retrospectivity? In Jaftha, this court placed no limit on the retrospectivity of its order. ***The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid****. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers* ***set aside if granted by default****. This was made clear in Menqa and Another v Markom and Others. A similar approach should be followed here.*

There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters, where homes were declared specially executable by the registrar, and sales in execution and transfers followed. The experience following Jaftha may be an indication that this fear is overstated. It must be remembered that these orders were ***issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere***

constitutional invalidity of the rule, under which the property was declared executable, is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil.

From what has been stated above, in relation to the legitimacy of resorting to execution in order to obtain satisfaction of judgment debts sounding in money, and that only deserving cases would justify other means to satisfy the judgment debt, it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the registrar, must also show, ***in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.***" (Court's emphasis)

(17) Once more the facts in the present appeal are distinguishable as the **Gundwana case (*supra*)** dealt with a default judgment, where in the present instance summary judgment was granted by consent.

(18) It is once more of utmost importance to remember that at no stage did the respondents launch an application for rescission of the summary judgment and did not provide an explanation for not doing so. In **Mkhize v Umvoti Municipality 2012(1) SA 1 (SCA)** Malan JA held:

> *"But it does not follow that the absence of judicial oversight will render the procedures followed, eg the issue of a warrant for execution and the subsequent sale in execution, invalid in all cases. The purpose of the judicial oversight ordered in Jaftha is to protect the right to adequate housing. Where, as in this case, the right to adequate housing is not engaged, invalidity does not necessarily follow.* ***This is so because the judgment and subsequent sale in execution stand until set aside. The plaintiff did not bring an application to rescind the default judgment entered against him.*** *"* (Court's emphasis)

This *dictum* is applicable in the present instance.

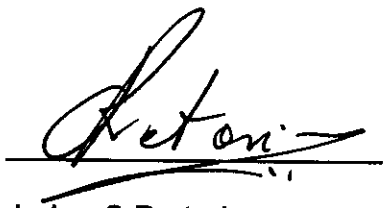
(19) The fact that the respondents failed to apply to have the summary judgment rescinded and did not adequately set out reasons why the court would not have granted a writ of execution at the time that the summary judgment was granted, must be taken into account as well. This court cannot find that when the warrant of execution was issued

after summary judgment had been granted with full knowledge of the facts existing at the time, the court would have refused the warrant of execution. The remedy has always been to launch an application for rescission of the summary judgment, which the respondents failed to do.

(20) The appeal has to succeed due to the reasons set out above.

(21) The order:

1. The appeal is upheld;
2. The order of the court *a quo* is set aside;
3. The main application is dismissed with costs;
4. The respondents are ordered to pay the costs of the appeal.

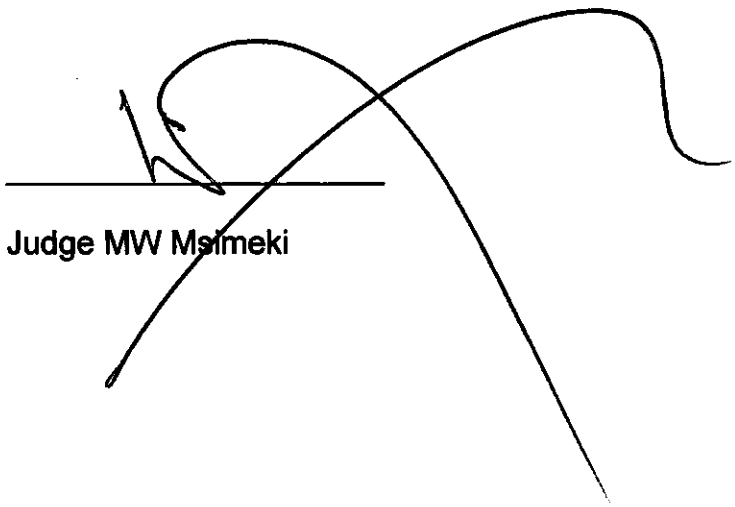


Judge C Pretorius

I agree.

Judge E Jordaan

I agree.



Judge MW Msimeki

Case number	: A714/2014
Matter heard on	: 17 February 2016
For the Appellant	: Adv FR Van den Heever
Instructed by	: Hack Stupel & Ross Attorneys
For the Respondent	: Adv Malowa
Instructed by	: Mahlangu Mashoko Attorneys
Date of Judgment	: 7 March 2016