IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)
CASE NO: 19958/2014
DATE: 16 AUGUST 2016
IN THE MATTER BETWEEN:

DOLAPO ABIODUN ADEGBUYI **Applicant**

AND

FIRSTRAND BANK LIMITED **1st Respondent**

CLOETE MURRAY N.O. **2nd Respondent**

ZAHEER CASSIM N.O. **3rd Respondent**

JUNITA CAROLINA KLOPPER-LOURENS N.O. **4th Respondent**

(The second, third and fourth respondents are the joint trustees in the insolvent estate of Ntando-enhle Dladla (I.D.: [8…….])
JUDGMENT

KOLLAPEN J:

1. The applicant has brought an application in terms of which he seeks the rescission of two orders granted against him.
2. On the 4th of June 2014 this Court granted judgment against applicant, at the instance of first respondent, in the following terms:

i. Payment of the sum of R1 690 641.59;

ii. Interest on the sum of R1 690 641.59 at the rate of 7.70% calculated daily and compounded monthly from 24 February 2014 to date of payment;

iii. Costs of suit to be paid by the first defendant (the applicant in the present rescission application) on the scale as applicable between attorney and client.

3. On the 18th of July 2014 this Court granted an order declaring the applicant's undivided share in the immovable property known as Erf 1… S…… F….. Township Registration, Province of Gauteng, Division J.R. ('the property') held by deed of transfer no. T1…... specially executable. This property is situated at 2…. C….. Street, S…… F……., Gauteng. In addition the Court granted an order authorising the Registrar of the Court to issue a warrant of execution against the applicant's fifty percent undivided share in the above- mentioned property.
4. In advancing the case for the rescission of the order made on the 4th of August 2014, the applicant states that he was not aware of the proceedings initiated against him, and while it appears that the summons was served by affixing it to the principal door of 9…… V…… Street, M……, P……, the applicant gives his address as 2….. C…… Street, S……. F……., Gauteng, which appears to be the address of the mortgaged property.
5. While it is not in dispute that the address in Meyerspark is the chosen *domicilium citandi et executandi,* the stance of the applicant is that the first respondent was

aware that he was not residing at the above address. While the first respondent denies this, it does appear however that the summons did not come to the notice of the Applicant.

Background and the order of the 4th of June 2014

6. The applicant and one Ntando-enhle Dladla obtained loan finance from the first respondent in 2007 to acquire the property and they became joint owners of the property. On the 17th of July 2013 Ms Dladla was sequestrated and the second, third and fourth respondents were appointed as trustees in her estate.
7. On the 14th of February 2014 the first respondent proved a secured claim in the insolvent estate of Ms Dladla in the sum of R1 733 781.65.
8. Given that the loan agreement that the first respondent entered into with the applicant and Ms Dladla provided for joint and several liability, the first respondent proceeded with an action against the applicant only for the full outstanding balance as well as an order of executability in respect of the applicant's undivided half-share in the property.
9. In seeking rescission, the stance of the applicant is that it was always, and still remains, his intention to purchase the insolvent's half-share of the property.
10. This can hardly constitute a defence to the claim of the first respondent and even while I must accept that the applicant would not have become aware of the issue and service of the summons, he with respect, does not disclose any defence which would justify this Court rescinding the judgment of the 4th of June 2014,
11. The fact that he became aware of the judgment on the 4th of August 2014 when the warrant of execution was served and when he therefore took steps to try to resolve the matter, would not constitute a defence in law, the applicant admitting that he was in breach of the obligations in respect of the loan agreement.

12. The application for the rescission of the order of the 4th of June 2014 must therefore fail.

The order of the 18*b July 2014

13. Service of the papers in respect of this application was also effected at 9…… V….. Street, M……., P…… and the applicant's stance is similarly that he was not residing there and he did not become aware of the proceedings initiated, although it was accepted that the address was the chosen *domicilium citandi et executandi.*

14. The applicant sets out the various steps he took once he became aware of the attachment of the property and these relate in part to his attempts to purchase the half-share of the property from the insolvent estate of Ms Dladla and various substantial payments made by himself towards the arrears. It appears that his actions were motivated by a desire to save the property he and his family reside in. I will deal with some of those steps later, to the extent that they may impact upon the consideration of the relief sought.

15. In this matter there is a clear indication that the applicant and his family live in the mortgaged property. He alludes to the risk of 'loss of shelter for my family' and his address that he gives as his place of residence is the mortgaged property.

16. The proviso to Rule 46(l)(a)(ii) provides as follows:

46 Execution - immovables

(l)(a) No writ of execution against the immovable property of any judgment debtor shall issue until -

(ii) Such immovable property shall have been declared to be specially executable by the court...: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the Court, having considered all the relevant circumstances, orders execution against such property.

17. From this it is evident that in ensuring the process by which the Court is to exercise

judicial oversight over the executability of a property that is the primary residence two key principles emerge:

i. A writ may not be issued unless the Court has considered all the relevant circumstances

ii. What the relevant circumstances are has been the subject of a comprehensive judgment of this division in *FIRSTRAND BANK vs FOLSCHER* 2011 (4) SA 314 where the Court indicated (at 332G to 333D) that some of the following factors had to be taken into consideration by the Court in deciding whether a writ should be issued or not:

- Whether the mortgaged property is the debtor's primary residence;
- The circumstances under which the debt was incurred;

- The arrears outstanding under the bond when the latter was called up;
- The arrears on the date default judgment is sought;
- The total amount owing in respect of which execution is sought;
- The debtor's payment history;
- The relative financial strengths of the creditor and the debtor;
- Whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- The proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
- Whether any notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
- The debtor's reaction to such notice, if any;
- The period of time that elapsed between delivery of such notice and the institution of action;
- Whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
- Whether the property is occupied or not;
- Whether the property is in fact occupied by the debtor;
- Whether the immovable property was acquired with moneys advanced by the creditor or not;
- Whether the debtor will lose access to housing as a result of execution being levied against his house;
- Whether there is any indication that the creditor has instituted action with an ulterior

motive or not;

- The position of the debtor's dependants and other occupant of the house, although in each case these facts will have to be established as being legally relevant.

18. It often happens in applications brought in terms of Rule 46(l)(a)(ii) that both parties have the opportunity to place relevant factors before the Court. On the other hand it is also so that the debtor often does not participate in such a process largely on account of not having knowledge of the application which is before Court. The present application is such an instance, and while on the one hand the first respondent may take the view that the application was properly served at the *domicilium citandi et executandi*, the reality is that despite such service, the application did not come to the notice of the applicant and he was accordingly unable to engage with it (either in terms of opposing it or placing relevant information before the Court as contemplated in Rule 46(l)(a)(ii)).
19. This in my view is an important feature of the exercise contemplated in Rule 46(l)(a)(ii) and there may well be merit in considering whether personal service of such an application should not be a requirement, simply in order to enable a Court to be properly seized with all the relevant circumstances.
20. In this matter the first respondent says in the application in terms of Rule 46 that the applicant 'chose not to defend the action and not place any facts before the Honourable Court demonstrating that the order sought by the first respondent infringed on their constitutional right to adequate housing'.

This assertion is clearly not correct as a decision not to place facts before the Court can only arise if the applicant was aware of the application. Given that he was not aware, it could hardly be said that he made an active choice not to place relevant information

before the Court.

21. Accordingly the Court, through no fault of the applicant, did not have before it all of the relevant circumstances that were contemplated in *FIRSTRAND BANK v FOLSCHER.*

22. While it would be purely speculative to venture how a court seized with all the relevant circumstances would have approached and dealt with the Rule 46 application, the following factors may have been, or are still, relevant (even though some of them occurred after the applicant became aware of the writ):

i. The applicant (since becoming aware of the writ) has made significant efforts to bring the arrears up to date.

He paid R105 000 on the 18th of August 2014. He also paid a further amount of R112 000 on the 25th of September 2014 which then had the effect of reducing the arrears to just R12 046-71 at that point.

ii. The result of his efforts appeared to have succeeded in persuading the first respondent not to proceed with the sale in execution which was due to take place in October 2014.

iii. He expressed a desire to purchase the insolvent's half-share of the property but it seems that there are various difficulties that stood in the way of this happening.

23. In my view the proceedings in terms of Rule 46 are a vital part of ensuring that the right to property encapsulated in Section 26 of the Constitution has meaning and effect.

24. Given that the applicant was not aware of those proceedings and that the Court had limited information before it regarding all the relevant circumstances, and given the conduct and actions of the applicant upon becoming aware of the writ, my view is

that a proper ventilation of all the circumstances may be warranted so that a Court may then, after being placed in possession of all relevant circumstances, apply its mind properly to the matter and make a determination. Clearly this did not happen in this matter for the reasons already given.

25. In *ABSA BANK LIMITED v DANIEL LEKUKU* (October 2014; case 32700/2013 High Court, Gauteng Division, Pretoria), the Court offered the following comments with regard to personal service at paragraph 66 of the judgment:

*'Further, there is no doubt in my mind that to the extent that rule 4(1) (a) (iv) allows for service on the 'outer * or 'principal door ' or 'under a stone' of a chosen* domicilium *it fails to be of any assistance to the Court when performing its inquisitorial role of ensuring that all the circumstances are taken into account before a primary residence of the debtor and her family is taken away. Courts must exercise caution when making a decision of such magnitude. Requiring that personal service upon the debtor be at least attempted is certainly part of exercising such caution and is part of the Court performing its constitutionally imposed duty to ensure the foreclosure process and outcome involving a primary residence is fair and just In this case the process followed can have a direct impact on the outcome. '*

26. I associate myself fully with those sentiments which I would find to be of application in these proceedings. In this regard the issue at stake is of great significance - it may well relate to the loss of a home that is the primary residence of the applicant and his family.

27. Under such circumstances, I am inclined to grant the relief sought in respect of the order made on the 18th July 2014 in terms of Rule 46. In this regard the applicant should be afforded a proper opportunity to both oppose such application if he so

desires, and to place information before the Court that he considers to be relevant for a full and proper determination as contemplated in Rule 46.

28. I would not under the circumstances make any order with regard to costs in respect of this part of the application.

29. **ORDER**

I make the following order:

I. The application for the rescission of the order of this Court of the 4th of June 2014 is dismissed with costs.

II. The order of executability of this Court of the 18th of July 2014 and the writ of execution arising therefrom are rescinded and set aside the No order is made as to costs in respect of the proceedings relative to the order of the 18th of July 2014.

IV. The applicant may, if he wishes to oppose the application in terms of Rule 46, file a notice of opposition within ten days of this order and thereafter file an opposing affidavit within the time period provided for in the Rules of this Court.

v. If the applicant fails to file a notice to oppose, or his opposing affidavit, the first respondent may proceed to enroll the application on the unopposed roll.

NKOLLAPEN JUDGE OF THE HIGH COURT OF SOUTH AFRICA

HEARD ON: 13 June 2016

FOR THE APPLICANT: Adv. B Motshwane

INSTRUCTED BY: Thengu Fakude Inc. (ref: TF/RAF/MR - SSJ/0020)

FOR THE FIRST RESPONDENT: Adv. L Meintjes

INSTRUCTED BY: Rorich, Wolmarans & Luderitz Inc (ref.: R Meintjes/B3/mh/F308667)