REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 12 August 2016
CASE NO: 37780/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

SIGNATURE

DATE: 13 September 2016

In the matter between:-

NEDBANK LIMITED Applicant

and

JOHANNES MOSHOEU MOLEBALOA Respondent

JUDGMENT

BEFORE: CR JANSEN AJ

[1] In this matter the Applicant obtained judgment by default against the Respondent on 12 February 2016 for an amount of R297 468.66, plus certain interest on the above amount as determined by a loan agreement between the parties.

[2] The cause of action was the usual claim for the accelerated payment of a loan secured by a mortgage bond registered against an immovable property which previously served as the primary residence of the Respondent and his ex-wife. The property is situated at 3 S R, P Ridge, A.

[3] It should be noted that the original loan was for an amount of R 120 000.00. Over time, cumulative interest and a string of debits listed as “legal fees” caused the debt to grow out of proportion to the original sum.

[4] At the time the default judgment was granted, a prayer to have the mortgaged property declared specially executable was postponed *sine die.* This appears to be the practice in this division since the full

bench judgments of ***Nedbank Limited v Mortinson*** **2005 (6) SA 462 WLD** and ***FirstRand Bank v Folscher*** **2011 (4) SA 314 GNP[1].**

[5] A *nulla bona* return was subsequently filed by the deputy sheriff, which then paved the way for execution against immovable property.

[6] I was informed from the bar that the attachment of the primary residence became embroiled in complications as a result of the divorce proceedings between the Respondent and his ex-wife.

[7] Further deeds registry searches by the Applicant revealed that a second property is registered in the name of the Respondent. This property is situated at 9 M S, M, S.

[8] The attachment and execution process then turned to this property and its residents. In pursuit of the original default judgment, a writ of execution against movables was issued for the judgment debt plus interest, together with costs in the amount of R650.00.

[9] The sheriff then visited the premises at 9 M S, M, S on no less than three occasions. The sheriff again issued a so-called *nulla bona* return which reads as follows:

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[1] These judgments aligned the implementation of the default judgment rules as well as the practice relating to execution against immovable property with the judgments of the Constitutional Court in ***Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*** **2005 (2) SA 140 (CC) 2005 (1) BCLR 78** and ***Gundwana v Steko Development CC and Others*** **2011 (3) SA 608**

"It is hereby certified:

That after attempts as listed below the warrant of execution could not be executed at 9 M S, M, Soweto, as neither the Defendant nor any attachable assets could be found.

The premises is constantly locked and it could not be ascertained whether the Defendant resides at the given address or whether the Defendant has any attachable assets."

[10] The Plaintiff then duly proceeded with an application to have the property at 9 M S declared "specially executable" in terms of rule 46(1)(a)(ii) of the Uniform Rules of Court. Again, this was done in accordance with what appears to be the practice after the rule changes which followed the *Jaftha (supra at footnote 1)* and *Gundwana (supra at footnote 1)* judgments of the Constitutional Court[2].

[11] The above practice in default judgment applications is aimed at giving a measure of protection to the primary residence of mortgagors against the relentless process of debt collection. There is, as this case illustrates, an additional class of residence that requires Constitutional protection against the unforgiving collection and execution process,

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[2] In cases not involving a primary residence, the rule notionally allows for automatic attachment against immovable property after attachment against movables has been insufficient. However, only the court can make the decision as to whether an immovable property used as a residence is the primary residence or not, as the registrar must refer all cases involving "residential property" to the court in terms of the proviso to rule 31(5). It appears that the practice is that execution against movables and immovables are always separated and judicial supervision is retained at both judgment and execution stages. The "or" separating rule 46(1)(a)(i) and rule 46(1)(a)(ii) seems to have become an "and", and the broader category of "residential property" thus effectively receives the same procedural protection as "primary residences" do..

namely that of the “family home”, being a widespread and well entrenched form of residential tenure in urban areas.

[12] When this matter was called, the Respondent was in court and informed the court that he wished to oppose the granting of the order authorising execution and wanted to place certain information before the court. Upon enquiry, he confirmed that he was indebted to the Applicant. He was, however, very concerned that the property at 9 M S might be sold on an auction, as this house was a “family house” where his siblings and some of their dependants lived. This “family house” was not the house in respect of which the debt had been incurred.

[13] Counsel for the Applicant submitted that, as the property at 9 M S, M, is not the primary residence of the Respondent, the proviso to rule 46(1)(a)(ii) did not apply and that attachment of this property could proceed without the enquiry into “all relevant circumstances”. In other words, although all the practice directives in respect of judicial oversight had been complied with, the immovable property sought to be attached at 9 M S, is not the bonded property and would appear to be an additional property of the Respondent, not his primary residence. As such, it did not, strictly speaking, qualify for the additional procedural and judicial oversight protection provided in respect of a primary residence.

[14] What appeared to be a routine default judgment following the established practice which involves judicial oversight over every significant component of the debt enforcement and execution process, transpired to be something very different once the matter was called and the facts scrutinised. The house at M S was not a "second property" with tenants in occupation. It was a *family home* with family members of the registered owner in occupation.

[15] The Respondent informed the Court that the house originally belonged to his parents. After they passed away, the house was registered in his name as the eldest son.

[16] From the printout of the electronic deeds registry search which was attached to the founding affidavit of the application, it appears that this property was previously registered in the name of the City of Johannesburg under title deed number T4. This fact should have raised red flags with the bank's officials involved in the collection process.

[17] This information in respect of historic ownership of the property suggests that this was probably a township property administered under the 1968 regulations dealing with residential properties in what was then Black townships[3]. In addition, it was probably later

[3] Regulations Governing the Control and Supervision of an Urban Bantu Residential Area and Related Matters, Proclamation 1036, published in Regulation Gazette 976 of 14

transferred in ownership to the occupants in terms of subsidised housing transfers. As such, it would engage the provisions of section 10B(1) of the Housing Act 107 of 1997[4]. On the papers I cannot make a definitive finding on these issues, however, on the face thereof, this history of ownership and transfer would seem to be the most probable.

[18] This aspect of the matter should have received more attention by the drafter of the application. Despite this history of ownership, a manager of the Applicant declared under oath in the affidavit supporting the application to have the property declared executable, that the property had not been acquired with any state assistance. This statement seems to have been made by rote, and could very well turn out to be incorrect upon further investigation.

[19] Apart from the fact that the state should register its interests in terms section 10B of the Housing Act more clearly on title deeds, persons involved in the attachment and execution against immovable properties must be more circumspect. Whenever a property was

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June 1968. Through a range of statutory measures, the permit system and its permissions to occupy were ultimately transformed into freehold, principally the Conversion of Certain Rights to Leasehold Act 81 of 1988 and the Upgrading of Land Tenure Rights Act 112 of 1991. Once registrable as freehold, many of these erven were transferred to identified occupants via state subsidised housing schemes such as the Enhanced Extended Discount Benefit Scheme provided for in the Housing Code published in terms of section 4 of the Housing Act 107 of 1997.. See also *Privatisation of State Housing With Special Focus on the Greater Soweto Area; Erica Emdon; Urban Forum, June 1993, Volume 4, Issue 2, pp 1-13* .

4 This section requires that a property which was obtained with state assistance first be offered to the state for purchase.

previously registered in the name of an organ of state such as a provincial housing board, a municipality, the South African Development Trust, the Independent Development Trust or the like, such fact must be brought to the attention of the relevant department of human settlements at provincial level in order for such department to exercise the state's rights under the section.

[20] I mention the possible relevance of section 10B of the Housing Act as an aside, and as something that should be considered before the matter is set down again. However, the problems with this application go much further and touch on another very important issue, namely the precarious position of persons occupying a *family home* when faced with debt enforcement proceedings against the registered owner, being the designated *head of household*.

[21] From the limited information given by the Respondent, Mr Molebaloa, it would appear that he is not the owner in the usual sense of the word. He probably holds ownership as the *head of the household*, as this term is used in customary indigenous law[5].

[22] Just as the judicial oversight over the collection and attachment process in respect of primary residences is now firmly established in

[5] See: *Customary Law in South Africa;* TW Bennett, 1st ed, 2015 reprint, Juta & Co at Chapter 7, pp 178 to 186, and Chapter 8, pp 263 to 265. The *family home* in customary law is something far more than just property. See also Chapter 9 of this textbook dealing with the *Consequences of Marriage.*

the Uniform Rules of Court and in the practice of our High Courts, in the same way so-called *family homes* should be protected from the vagaries of the legal process. These are primary residences of a special kind that are largely invisible to the legal system, as the deeds registry system does not properly cater for this form of ownership.

[23] *Family homes*, in their legal context, often feature in judgments dealing with *intra*-family disputes, although very little is found on the subject in reported judgments, despite the fact that hundreds of thousands of South Africans, if not millions, probably live in homes which they describe as *family homes*.

[24] I could find a number of unreported judgments that refer to *family homes*, and to the special relationship between the person ostensibly registered as the owner of the property and the other occupants, normally family members of the former. However, the relationship between the owner and the property is generally analysed in the paradigm of individualised and registered common law ownership, and not in the context of indigenous law. The special relationship between the occupants and the ostensible owner is not translated into a real limitation of the title.[6]

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6 *Khwashaba and another v Ratshitanga and others* (27632/14) [2016] ZAGPJHC 70 (29 February 2016*); Sebatana v Mangena and Others* (08560/13) [2013] ZAGPJHC 246 (6 August 2013); *Booysen v Matjie and Others* (21283-12) [2013] ZAGPJHC 91 (27 March 2013); *Leballo v Masungany and Others* (40882/2012) [2014] ZAGPPHC 91 (19 February 2014)

[25] In the reported judgment of ***Du Plooy and Another v Du Plooy and Others***[7] the Supreme Court of Appeal dealt with such an *intra*-family dispute as a matter involving possible joint ownership. A "family home" as an object of customary law was neither raised, nor considered in that matter.

[26] The special relationship between the ostensible owner of a family home and the other members of the family, especially those occupying the house, should, in my respectful view, also be enforceable or protectable against third parties such as creditors of the ostensible owner[8]. For this to happen, the relationships created by customary law must be reflected in the deeds register.

[27] The fact that individual and family tenure rights in rural areas are not reflected in the deeds register, is well known. I quote from an article by Professor Gerrit Pienaar which highlights the problems caused by the fact that tenure rights in respect of communal land are not reflected in the deeds registry:[9]

> *In South Africa two diverse property regimes exist alongside one another, namely the system of individualised, common-law landownership, predominantly based on civil-law principles, and the system of communal land tenure, predominantly based on the shared use of land by communities in terms of indigenous-law principles. Added to this is a registration system originally based on*

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7 [2012] ZASCA 135; [2012] 4 All SA 239 (SCA) (27 September 2012)

8 Where the credit relationship is extraneous to the family relations. To what extent, and in what manner, the family can encumber such a property, is not at issue here.

9 *Land information as a tool for effective land administration and development*, in *Pluralism and Development: Studies in Access to Property in Africa;* Mostert and Bennett, 2011, Juta & Co, p238

> *the Dutch land registration procedures, but modified in the nineteenth century through the introduction of English cadastral survey procedures linked to the registration system. Only individualised common-law landownership, co-ownership and limited real rights are registrable. The registration system does not provide for the registration of communal land rights, which has the effect that official information in respect of communal land tenure is currently unreliable.*

[28] I would add that there is an urban dimension to this problem as well. Official information in respect of urban erven does not properly reflect the *intra* family relationships which exist as a fact, albeit it in unregistered form. Ncgobo J commented on the ubiquity of the *family home* in South African families in the matter of ***Bhe and others v Magistrate, Khayelitsha and others (Commission for Gender Equality as Amicus Curiae)*** 2005(1) SA 580 (CC) and gave an exposition of the customary law context.[10] I respectfully need no further authority or evidence before me to realise that the Respondent's *family home* is entitled to Constitutional protection by virtue not only of the provisions of sections 26(1), (2) and (3) of the Constitution, but also by virtue of the provisions of section 211(3) thereof.

[29] Without professing to know the finer details of the phenomenon, it is clear that this type of home ownership is common in both urban and rural Black communities. In the urban setting, it would further appear to be a modern phenomenon which is the result of customary law practices being grafted onto the urban tenure systems of the

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[10] At paras and 162 to 183, 190, 228, 229 and 232

apartheid era, and later onto the upgraded and converted tenure systems of the democratic era[11].

[30] The house at 9 M S in M is a typical example. From the deeds office printout in respect of the property, it appears that the property was previously registered in the name of the City of Johannesburg. This was the positon in 1992. Thereafter, it was registered in the name of Mr Molebaloa. He confirmed that it was a house which had been allocated to his parents initially.

[31] Without having the benefit of a precise tenure history in respect of the property, the available information is sufficient to create a strong presumption that the *"ownership"* of Mr Johannes Moshoeu Molebaloa is the result of him being designated as the *"owner"* by virtue of either the intestate succession rules of customary law, *alternatively,* the statutory processes that were followed in terms of the relevant legislation that converted and upgraded urban land tenure rights and which identified him as the person to whom registered land ownership should pass.

[32] There is no doubt that Mr Molebaloa accepts that his role as the nominally registered owner is to ensure that the house is there for the benefit of his family members. In other words, that a special

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11 The primary legislation in this regard is the Conversion of Certain Rights to Leasehold Act 81 of 1988 and The Upgrading of Land Tenure Rights 112 of 1991.

relationship of trust exists and that he is the *de facto* trustee in this relationship. That his unrelated debt to the Applicant had placed this house in jeopardy, was his main concern.

[33] It would appear that many families within the Black community do not liquidate the immovable properties of their deceased parents. These properties, that would generally be unbonded properties, obviously serve an extremely important socio-economic role in these families. They serve as permanent housing for some of the family members, and as temporary housing for family members who are in transit or who may be involved in a divorce. In the present matter it would appear that Mr Molebaloa himself resided at the premises for a period after his divorce.

[34] The residents in such a *family home* are extremely vulnerable. Their vulnerability was commented on in the ***Bhe matter (supra)***[12], a matter which dealt with intestate succession in customary law. The vulnerability also extends to occupants of homes where title is upgraded or converted in terms of the legislation referred to above, as the administrative processes follow the same logic as the succession rules of customary law. However, such occupants will not be vulnerable if proper recognition is afforded to the latent indigenous law relationships, especially those that relate to the *family home.*

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[12] At paragraphs 17,18 and 96 (per Langa DCJ)

[35] Much has been written about the history of formal land tenure in urban areas, and the long shadow which it continues to cast on present day realities. In the matter of *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another*[13], the Constitutional Court had occasion to deal with the history of Black urban tenure prior to 1994. Since the judgment of *DVB Behuising*, the legislative history and its present day context has been dealt with in the PhD dissertation of Gustav Muller[14].

[36] The irony is that the process of upgrading and conversion of rights to give Black people greater tenure security and ultimately the right of ownership, led to a position where many persons are identified as the owners of property where their ownership is, or should be, limited by the interests of their family members. The problem is caused by the individualistic nature of the European system of property title and its registration in our cadastre, as described by Pienaar in the article quoted above. Measures aimed at granting tenure security in urban areas have not done so within a customary law paradigm.

[37] In this way, an important trust relationship with its roots in indigenous law, is invisible to the law and, no doubt, many of these homes are lost to their beneficiaries. The present case is a good example where

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[13] [2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (2 March 2000) at paras 41 to 51. See also *Shelfplett 47 (Pty) Ltd v MEC for Environmental Affairs and Development* 2012(3) SA 441 (WCC) at para 36.

[14] Chapter 2.2 (*Black Land Tenure and Urbanisation*) in the 2011 PhD dissertation (Stellenbosch) entitled *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law.*

a *family home* is simply viewed as a second property of the registered owner.

[38] *Family homes*, as a phenomenon, is obviously not limited to properties that were upgraded or converted in terms of the legislation referred to above. It may very well be that since 1994 ownership has devolved in terms of succession arrangements which lead to a single individual being reflected as the owner of what is actually a *family home*. In the erstwhile *"independent home lands"* ownership of residential properties were established well before 1986[15].

[39] Such *family homes* that are otherwise unencumbered, should not be subject to attachment and execution processes extraneous to the liabilities of the family and liabilities that attach to the property itself.

[40] Attorneys mandated to collect debts on behalf of their clients should be aware of the possibility that an immovable property may be a family home and that the registered owner of such a home should not be considered to be the beneficial or real owner. Such properties should also not be encumbered without the permission of all the relevant adult family members and they should not be subjected to attachment in respect of the debts of the nominal owner. Simple

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15 Since which date ownership was also available in "White South Africa" in terms of the inserted chapter VIA of the Black Communities Development Act 4 of 1984 (by way of Act 74 of 1986).

enquiries in respect of the acquisition of the property and its ownership history will reveal this underlying relationship.

[41] It is not practical to have every such house registered in the name of a formal trust registered in terms of the Trust Property Control Act 1957 of 1988. The special status of such properties should be directly registered against the title deed by way of endorsement similar to those provided for in sections 25(3) and 45*bis* of the Deeds Registries Act 47 of 1937.

[42] Despite the long history of postponements in this matter, I considered it fair to grant Mr Molebaloa a further postponement for a period of at least four weeks to seek necessary legal advice in regard to the aspects which he raised in this matter, albeit informally and in person. As noted above, a number of aspects in this case deserve further investigation.

[43] In addition, I advised him that his siblings and the other family members staying at the property should also seek independent legal advice. I therefore postponed the matter *sine die* and ordered that the matter not be set down again for at least one month.

[44] The concept of a *family home* is not formally recognised in our law[16]. It is, however, a form of home ownership that requires urgent and comprehensive recognition in our legal system. The process of protecting this type of house should start with the judiciary and the legal practitioners involved in the process of attachment of residential properties. Ultimately it is for the legislature to create the necessary protective framework, in terms of which indigenous property must be protected against the excesses of the mercantilist world, in the same way that the law protects entrusted property.

[45] As a result I made the following order:

1. The matter is postponed *sine die*;

2. The matter may not be set down within a period of four weeks to enable the Respondent to seek legal advice;

3. No order is made as to costs.

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16 It should be noted that other jurisdictions that afford special protection to certain classes of homes, often refer to such homes as "family homes", whereas our courts have come to use the term "primary residence". The term "family home" has, however, entered our academic language. See: *The Pro-Creditor Approach in South African Insolvency Law and the Possible Impact of the Constitution*, Boraine, Evans, Roestoff and Steyn in (2015) 3 NIBLeJ 5 at paras 68 and 83. As is apparent from this judgment, I use the term "family home" as the term was used in the *Bhe* matter (*supra),* as a form of indigenous customary law property that comes loaded with personal family relationships and social conventions. See also: *Treatment of a Debtor's Home in Insolvency: Comparative Perspectives and Potential Developments in South Africa,* L Steyn, International Insolvency Review 22(3) · December 2013. See also: *Re Holliday (a bankrupt), ex parte the trustee of the bankrupt v The bankrupt and another* [1980] 3 All ER 385 for the position in the UK.

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