



REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No.: 6588/2012

In the matter between:

NEDBANK

Applicant

and

ALLAN ALLIC OOSTHUIZEN

Respondent

Identity Number: 7[...]

JUDGMENT

Heard on: 17 February 2014

Judgment: 28 February 2014

BEZUIDENHOUT, AJ

[1] Applicant brought an application in terms of Rule 46(1) of the Uniform Rules of Court seeking the following relief:

“1. An order declaring specially executable the immovable property described as:

(1) A unit consisting of –

(a) Section No. 2 as shown and more fully described on Sectional Plan No.SS153/08, in the scheme known as ERF 328 in respect of the land and building or buildings situate at MTUNZINI, in the

UMLALAZI MUNICIPALITY of which section the floor area, according to the said sectional plan, is 173 (One Hundred and Seventy Three) square metres in extent; and

- (b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer No. ST13724/08

- (2) An exclusive use area described as Y2 (YARD) measuring 580 (FIVE HUNDRED AND EIGHTY) square metres being as such part of the common property, comprising the land and the scheme known as ERF 328 in respect of the land and building or buildings situate at MTUNZINI, in the UMLALAZI MUNICIPALITY as shown and more fully described on Sectional Plan No.SS153/08 held by Notarial Deed of Cession No.SK1171/08

- 2. that the Registrar of the above Honourable Court is authorised to issue a warrant of execution in respect of the judgment granted in terms of paragraph 1 above and the immovable property identified in paragraph 1 above and the immovable property identified in paragraph 1 above;
- 3. alternative relief."

[2] The application was first set down on 30 October 2013. It was thereafter adjourned and on 12 December 2013 it was again adjourned to 17 January 2014 and applicant was directed to serve the application papers on the bondholder. It was also recorded that respondent was present and the adjournment was to enable him to obtain legal representation. On 15 December 2013 the papers were served on the bondholder Standard Bank. The application was thereafter adjourned to 17 February 2014. Notice of set down of the application on 17 February 2014 was served on respondent personally on 11 February 2014 and also on Standard Bank.

[3] On 17 February 2014 there was no appearance by respondent and also none on behalf of Standard Bank. Mr Moodley appearing on behalf of applicant moved for an order in terms of paragraphs 1 and 2 of the Notice of Application.

[4] I informed Mr Moodley that as the relief sought was an order that the primary residence of respondent be sold in execution that a valuation of the property was required. Mr Moodley submitted that as the judgment was not in respect of a bond, and not in favour of the bondholder such was not required. He further submitted that applicant would not be able to obtain a valuation of the property. He also submitted that the requirements as set out in the practice directive of this division relating to declaring bonded property specially executable are not applicable.

[5] The facts of this case are briefly the following:

- 5.1 Applicant obtained default judgment against respondent on 13 September 2012 in the sum of R339,408-40 plus interest at 14% per annum from 30 May 2012 to date of payment and costs. This was in respect of a Scania 470 R124 GB Rigid Truck Tractor which was financed by applicant.
- 5.2 A writ of execution was issued against respondent on 15 March 2013. The Sheriff found no moveable property and returned a *nulla bona* return on 28 March 2013. Applicant now wants to proceed against the immovable property.
- 5.3 Applicant in the affidavit filed in support of the application stated that it is unaware of the financial situation of respondent and whether he is generating a income. The attention of respondent was also drawn to the provisions of section 26 of the Constitution.
- 5.4 A copy of the title deed of the property is attached to the affidavit indicating that the property was purchased during March 2009 and that

Standard Bank registered a bond for the sum of R950,000-00 plus an additional sum of R187,500-00 against the property. From the returns of service it appears that respondent is residing in the property.

[6] The submissions by Mr Moodley require that Rule 46(1)(a) of the uniform rules of court, the practice directives of this division and the constitution be considered.

[7] Rule 46(1)(a) states:

“No writ of execution against the immovable property of any judgment debtor shall issue until –

- (i) . . .
- (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of Rule 51(5) by the registrar: 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.”

[8] The practise note of this division dealing with default judgments and execution against primary residence requires the following in paragraph 6 thereof:

“6. If the property sought to be declared specially executable is a primary residence, then the following would apply:

- (a) The circumstances under which the debt was incurred;
- (b) The debtors payment history;
- (c) Whether any notice in terms of section 129 of the National Credit Act was sent to the debtor prior to the institution of action;
- (d) The current estimated value of the property if sold on the open market (not the value of a forced sale);

- (e) The number and amount of instalments in arrears when the judgment creditor exercised its contractual rights against the mortgage;
- (f) Whether the property is in fact occupied by the owner, and
- (g) That the court on hearing the application for declaring the primary residence of the judgment debtor executable, may call for further information to enable the court to exercise its discretion whether to order execution or not.”

[9] Section 26 of the Constitution of the Republic of South Africa 1996 dealing with housing stipulates:

- “(1) Everyone has the right to have access to adequate housing.
- (2)
- ...
- (3) No one may be evicted from their home, or have their home demolished without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.”

[10] Before a primary residence can therefore be declared executable the court must first consider all relevant circumstances. The question arises whether the authorisation of a writ in the present circumstances must be dealt with as in the case of a bondholder in terms of the practice directive. If not, would a creditor who is not a bondholder not be placed in an advantageous position as the burden of proof would be less strenuous but the effect the same in that a debtor loses his primary residence.

[11] In *Standard Bank of SA Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) referring to the decision of the Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) it held at 273G:

“Nor did the Constitutional Court decide that s26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of ‘adequate housing’ would compromise his or her s26(1) rights and would therefore need to be justified as contemplated by s36(1).”

[12] In *Mkhize v Umvoti Municipality* 2010(4) SA 509 (KZP), Wallis J (as he then was) referring to the *Jafta* decision held at 529H:

“In my view the orders made by the Constitutional Court should be construed as applying only when the immovable property in respect of which execution is sought is the debtors home.”

[13] Dealing with the judicial oversight required before immovable property is declared executable it was held as follows in *Nedbank v Fraser* 2011 (4) SA 363 GSJ:

“[23] The context of the judicial oversight provided in section 26(3) of the Constitution is a matrix of factors. There are: the existence of the social need for housing, the constitutional right to access to adequate housing embodied in section 26(1), the need for people to honour their debts, the need for debts to be enforced by a court process and the need for execution, all of which serve the housing need, as well as the drastic nature and far reaching consequences of executing against a person's home and the scope for the abuse of the process of execution.

[24] Seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter or check on execution that does not serve the social interests and which is an abuse. Expressed simply, the function of the court is to safeguard against abuse of the execution process. It is with the consideration of this context and purpose that a determination is made whether or not to declare a person's home executable.”

[14] From the above quotations it is apparent that before any primary residence is declared executable there are many factors to be considered to ensure that there is no abuse of the execution process. At all times the provisions of the Constitution must be considered and applied.

[15] Commercial activity must be allowed but as the Constitution demands that every citizen is entitled to adequate housing, this factor must be considered before declaring a person's primary residence executable. The harm that both parties may suffer must be weighed up in an attempt to arrive at a just and fair decision.

[16] It would appear to me that when a writ of execution is to be authorised in respect of the primary residence of a debtor, the same principles must be applicable whether it is a bondholder or a creditor of other sorts wanting to declare the property executable. This requires that all relevant facts be placed before court. Judicial oversight is required irrespective whether the application to declare immovable property executable results from a bond or any other debt.

[17] There is however a distinction between a bondholder declaring a property executable and a non-bondholder in that in the latter case there must be a *nulla bona* return from the Sheriff in respect of movables, or that there are insufficient movables. Accordingly the immovable property is the only remaining asset of the debtor. The bondholder does not have to first proceed against moveable property.

[18] However if a primary residence of a debtor is to be declared executable by a creditor who is not a bondholder a valuation of the property concerned would be of assistance and if there is a bond registered against the title deed of the property the outstanding amount in respect of the bond would also assist the court in exercising the judicial oversight required. An attempt should be made by applicant to provide such information. If it is not provided the reasons therefore must be set out in applicant's affidavit.

[19] In the present case respondent was present at court on previous occasions and the notice of set down for 17 February 2014 was served on him personally. Respondent elected not to appear or to place any facts before court why his property should not be declared executable. He was in the papers specifically informed that he had the right to do so. Standard Bank, the bondholder, also placed no facts before the court. In those circumstances there was nothing more that applicant could do.

[20] I accordingly make the following order:

An order is granted in terms of paragraphs 1 and 2 of the Notice of Application.

BEZUIDENHOUT, AJ

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Respondent: No appearance.