IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

Case No: 17622/2008

In the matter between

FIRSTRAND FINANCE COMPANY LIMITED Applicant

And

PETER JAQUE WAGNER N.O. First Respondent

PETER JAQUE WAGNER Second Respondent

JUDGMENT DELIVERED ON 11 NOVEMBER 2014

VAN ROOYEN, AJ

[1] This is an application in terms of s 30 of the Administration of Estates Act, 66 of 1965, to permit the sale of immovable property ("the property") co-owned by the Second Respondent and the deceased estate of his late spouse ("the deceased") who died on 6 April 2009. The Second Respondent has been cited as the First Respondent in his capacity as the executor of the deceased's estate which has not been finalised.

Procedural History

[2] The Applicant ("Firstrand"), a bank, lent money ("the loan") to the Second Respondent and the deceased and as security a mortgage bond in favour of Firstrand was registered over the property.

[3] In 2008 Firstrand instituted an action against the Second Respondent and the deceased because, according to Firstrand, they had failed to make payments in respect of the loan. Judgment for the payment of R95 891 was sought against them jointly.

[4] The Second Respondent and the deceased did not file a notice of intention to defend and on 8 April 2009 default judgment was granted against them for payment of R95 891 together with interest, costs and an order declaring the property executable.

[5] Sometime later Firstrand discovered that the deceased had in fact passed away shortly before the judgment was granted. In December 2011 an application was therefore launched by Firstrand in which it sought an order that the default judgment be varied to reflect the First Respondent, in his capacity as the executor of the deceased's estate, as a party.

[6] The application launched in 2011 was not opposed and on 3 February 2012 an order was granted in which the default judgment order was varied to reflect the First Respondent as a party.

[7] In March 2013 this application was launched.

Defences

[8] In their answering affidavit the Respondents raised the following two categories of defences: (a) The debt owing to Firstrand had been settled; (b) Should the property be sold in execution, the Second Respondent will be deprived of his right to access to adequate housing contemplated in s 26(1) of the Constitution.

Denial of the debt

[9] The Respondents assert that they are not liable to Firstrand for the following reasons: (a) Firstrand's records are inaccurate regarding payments; (b) the interest rate applied by Firstrand was incorrect; (c) there was no default at the time the action was instituted; (d) Firstrand was paid more than it was entitled to; (e) the outstanding amount in respect of the bond was inaccurate.

[10] These defences do not assist the Respondents as default judgment was granted against them. No application for rescission of that judgment has been brought by the Respondents and, consequently, that judgment is binding [1].

Approach to s 30 in view of the right to housing

[11] Section 30 reads as follows:

> "No person charged with the execution of any writ or other process shall-
> (a) before the expiry of the period specified in the notice referred to in section twenty-nine; or

[1] *Wright v Westelike Provinsie Kelders Bpk* 2001 (4) SA 1165 (C) paras [34]-[35] referred to with approval in *MV Ivory Tirupati and Another v Badan Urusan Logistik (aka Bulog)* 2003 (3) SA 104 (SCA) para [30]

(b) thereafter, unless, in the case of property of a value not exceeding R5 000, the Master or, in the case of any other property, the Court otherwise directs,
sell any property in the estate of any deceased person which has been attached whether before or after his death under such writ or process: Provided that the foregoing provisions of this section shall not apply if such first-mentioned person could not have known of the death of the deceased person." [2]

[12] In Gounder N.O. v ABSA Bank Ltd & Another 2008 (3) SA 25 (NPD) para [15] the Court found that an order of executability in terms of Rule 46 of the Uniform Rules of Court can never amount to a direction as contemplated in s 30(b). It was found [3] that it would be undesirable to provide a numerus clausus of the facts and circumstances which a court should take into account in deciding whether to make a direction contemplated in s 30(b). The Court pointed out [4] that our jurisprudence in this regard was largely undeveloped, the decisions in De Faria v Sheriff, High Court, Witbank 2005 (3) SA 372 (T) and Wright v Westelike Provinsie Kelders Bpk, supra, being the only reported cases on s 30 at the time. It was stated [5] that "each case must obviously be evaluated and considered on its own peculiar facts and circumstances." The Court continued to state [6] that there are considerations referred to by the Constitutional Court in Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others 2005 (2) SA 140 (CC) which "might have to be" considered. The Court considered s 30 in the context of the scheme of administration envisaged in the Act and concluded [7]:

"In my view, it is only in exceptional cases that leave to sell an estate asset through a process of execution should be entertained before at least the first

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2 Emphasis supplied
3 Para [19]
4 Para [19]
5 Para [19]
6 Para [22]
7 Para [26]

liquidation and distribution account has been approved, has lain for inspection and the period of objections has expired without any objection."

[13] Subsequently, and commencing with Gundwana v Steko Development & Others 2011 (3) SA 608 (CC), the considerations referred to in Jaftha and which, according to Gounder, "might have to be" considered in the application of s 30, have been amplified by our courts in the context of Rule 46. I will deal with that more fully below.

[14] Like any other statutory provision, s 30 must be interpreted in accordance with the dictates of s 39(2) of the Constitution which provides that, when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. Consequently, s 30 must be interpreted through the prism [8] of s 26 of the Constitution which accords to everyone the right to have access to adequate housing and which provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances.

[15] It is for the same reason that a court, in considering whether property should be declared executable in terms of Rule 46, will perform judicial oversight and, as was stated in Gundwana [9]:

"…in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that

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[8] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) para [21]

[9] Para [53]

alternative course should be judicially considered before granting execution orders."

[16] Consequently, when a debtor stands to be deprived of his primary residence, the approach to be followed with reference to s 26 of the Constitution before making an order in terms of Rule 46, should equally apply when an order is sought in terms of s 30 of the Act. Regardless of the fact that the property has been declared executable in terms of Rule 46, this Court must therefore ensure that, having regard to the "peculiar facts and circumstances" [10] of this matter, an order permitting the sale of the property will be in accordance with the spirit, purport and objects of s 26 of the Constitution [11]. That is particularly so when, as in casu, all relevant circumstances were not raised and considered before a writ of execution in terms of Rule 46 was authorised.

[17] The authorities relating to the interaction between Rule 46 and s 26 of the Constitution should therefore be considered in the application of s 30 of the Act when the subject is the primary residence of a debtor.

More reasonable means

[18] The Second Respondent, a 68 year old pensioner, receives a monthly pension of R1 800 and the property is his primary residence. In these circumstances due regard should be taken of the impact that the sale of the property may have on the Second Respondent and "(i)f the judgment debt can be satisfied in a reasonable manner" without depriving the Second Respondent of his primary

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[10] *Gounder* para [19]

[11] This requirement is in addition to the necessity to bear in mind that s 30 must be applied in the context of the scheme of administration envisaged in the Act, as was pointed out in *Gounder* para [26].

residence, "that alternative course should be judicially considered" before granting an order that will deprive the Second Respondent of his primary residence.[12]

[19] The Second Respondent, in his answering affidavit, stated that "Firstrand is well aware of my personal Old Mutual policy that was ceded to them as security, which policy is currently worth approximately R450 000,00 and the policy matures and pays out in 2016".

[20] The policy was not divulged in Firstrand's founding affidavit in this matter or in the pleadings before the Court when default judgment was granted. In its replying affidavit Firstrand merely stated that it "is well aware of the policy referred to".

[21] This additional security may have an impact on the question as to other reasonable means available to Firstrand. The current value of the policy exceeds the sum of the judgment debt by far. However, neither of the parties has provided detailed information regarding the terms of the additional security and whether the Second Respondent will be able to cash in the policy earlier than 2016. This information is necessary to establish whether the judgment debt can be satisfied in a reasonable manner without depriving the Second Respondent of his primary residence. [13]

[22] In Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases 2011 (6) SA 111 (WCC) para [25] it was stated that it is "the duty of a court to act proactively to obtain whatever additional information might appear

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[12] *Gundwana* para [53]
[13] *Gundwana* para [53]

relevant for the purpose of consideration in terms of rule 46(1) if, in a peculiar case, some or other feature of the matter flashes warning signals". This applies in casu with the disclosure of the cession of the policy as additional security being a "warning signal" that may not be ignored. Before I determine how additional information in respect of the policy is to be placed before this Court, I will consider the duty of the parties in this regard.

[23] In my view, it can be expected of a creditor to divulge all the security it holds when it approaches a court for relief which, if granted, will lead to the sale of the primary residence of a debtor. That is a necessary corollary of the principle that it should be established whether the judgment debt can be satisfied in a reasonable manner without depriving the debtor of his primary residence [14]. Additional security held by a creditor which can be resorted to for purposes of paying a debt, may constitute such an alternative and should therefore be brought to the attention of a court to assist it in performing its judicial oversight and in ensuring that the spirit of s 26 of the Constitution prevails.

[24] In any event, in circumstances such as these it is not only the debtor, but also the creditor, who ought to divulge all relevant information relating to the security held by the creditor. It is information that is within the knowledge of Firstrand which is therefore to be distinguished from the ordinary situation referred to in Standard Bank v Bekker [15] where it is for the debtor to alert a court to any facts or circumstances that implicate his s 26 rights. This is a situation where the creditor is "able to comment upon the debtor's ability to

[14] *Gundwana* para [53]
[15] Para [26]

effect payment of any arrears, by means other than allowing execution against his home to proceed" [16].

[25] Until such time as further information about the nature of the policy, the nature of the security held by Firstrand and information as to whether the policy can be cashed in earlier than 2016 be divulged, this Court will not be in a position to determine whether the judgment debt can be satisfied in a reasonable manner without depriving the debtor of his primary residence [17].

[26] In the circumstances it will be in the interests of justice that both parties be given an opportunity to file further affidavits to deal with the outstanding information.

[27] I therefore make the following order:

(a) The Applicant shall file an affidavit dealing with the Second Respondent's Old Mutual policy, ceded to the Applicant as security, by 2 December 2014.

(b) The Respondents shall file an answering affidavit (if any) dealing with the affidavit of the Applicant referred to in (a) above within 15 days of service of the Applicant's affidavit.

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16 *Firstrand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) para [43]

17 *Gundwana* para [53]

(c) The Applicant shall file a replying affidavit (if any) dealing with the Respondents' answering affidavit referred to in (b) above within 10 days of service of the Respondents' affidavit.

(d) As soon as the affidavits referred to above have been filed, any of the parties may set the matter down for hearing on the opposed motion roll.

(e) All questions of costs shall stand over for later determination.

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VAN ROOYEN, AJ