Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 13668/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 13 February 2017
Judgment: 16 February 2017

In the matter between:

RICARDO BARETZKY	First Applicant
SHIN HAE BARETZKY	Second Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED	First Respondent
THE NATIONAL CREDIT REGULATOR	Second Respondent
THE SHERIFF: STRAND	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

---

JUDGMENT

BINNS-WARD J:

[1] An immovable property owned by the applicants has been attached to satisfy a judgment obtained against them. The property, which is in Gordon's Bay, is residential. But the applicants do not live there. It is currently let to a tenant. The applicants reside in

Belgium. The sale in execution has been suspended pending the determination of the applicants' application for a '*declaratory order declaring rule 46 of the High Court rules unconstitutional and inconsistent with the right to property in terms of section 25(1) of the Constitution in so far that it fails to prescribe a reasonable minimum reserve price based on the fair market value and forced sale value of the property being executed and the reasonable forced sale value considering the judgment debt amount being recovered and that rule 46 of the High Court rules and the National Credit Act be amended within 12 (twelve) months to give effect to the said declaratory order*'. It will be observed that the formulation of the relief sought by the applicants is somewhat incoherent, but upon analysis it seems that the challenge is in fact to the constitutionality of the rule 46(12) of the Uniform Rules of Court on the basis that it omits to provide for a reserve price. Despite the wording of the notice of motion, the application does not implicate any provision in the National Credit Act 34 of 2005.

[2] There was no proof in the court file that notice of the application had been given to any of the respondents. The application had obviously been served on the first respondent (the judgment creditor) because it opposed the application and was represented at the hearing. I was satisfied that the fourth respondent (the Minister of Justice and Constitutional Development) had received notice when the applicants' counsel handed up a copy of a notice from the state attorney's office indicating that the Minister abided the judgment of the court. It did not appear to me (and counsel agreed) that the second and third respondents (the National Credit Regulator and the Sheriff: Strand, respectively) had any direct or substantial legal interest in the relief sought, so no point would have been served by deferring the hearing to obtain proof of service on them.

[3] The applicants were also unable to satisfy me that notice of the application had been given as required in terms of rule 16A. That is not to say that notice had not been given. A copy of such a notice had been included in the papers before me. It did not, however, bear the registrar's stamp and there was therefore no indication whether or not the registrar had indeed received it. The applicants' counsel sought a postponement of the hearing of the application to enable that issue to be addressed. The first respondent opposed the request for a postponement and argued that the requirement should be dispensed with in terms of rule 16A(9). I was persuaded that it would not be in the interests of justice, having regard to the character of the case presented on the papers, for the matter to be postponed and accordingly

made an order in terms of rule 16A(9) dispensing insofar as necessary with the requirements of the rule.

[4] Rule 46 regulates the procedure for the sale of immovable property in execution of judgments of the High Court. Subrule (12) provides:

> *Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder*.

(Subrule (5) affords a creditor whose claim to the proceeds of the attached property is preferent to that of the judgment creditor to stipulate a reserve price.)

[5] Section 25(1) of the Constitution provides:

> *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*

[6] It was common ground that the effect of a sale in execution was to deprive a judgment debtor of its property and that the pertinent rules of court, including rule 46(12), fell for the purposes of s 25(1) to be characterised as 'law of general application'. Counsel were also in agreement that the approach to determining whether the subrule permitted arbitrary deprivation of property should be informed by the judgment of the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ('Wesbank').

[7] At paragraph 66 of *Wesbank* the importance of the legislative context in question was emphasised. It was recognised that '[i]*n certain circumstances the legislative deprivation might be such that no more than a rational connection between ends and means would be required, while in others the ends would have to more compelling to prevent the deprivation from being arbitrary*'. At para 100 of the judgment the Court held '*...it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:*

> *(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.*

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. ….

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.

[8] Mr *Engelbrecht*, who appeared for the applicants, was constrained to acknowledge that he was unable upon an application of the tests stated in para. 100 of *Wesbank* to contend that the impugned provision permitted arbitrary deprivation of property, either substantively or procedurally. I think his concession was properly made. The result, however, was that the application remained for determination while the court was deprived of the benefit of any reasoned oral argument in support of it.

[9] There is a public interest in the exigibility of judgments sounding in money. That creditors should obtain the authorisation of a court to exact payment from their debtors is a fundamental aspect of the rule of law. The alternative would be the chaos and lawlessness of a regime of self-help, in which the most vulnerable in society would be the most exposed to abuse. A court regulated system of debt recovery must be effective, however, if it is to command respect. There would be no point in creditors having to obtain judgments for the purposes of exacting recovery from their debtors if there was no law in place to lend force to the judgments and provide for their execution. The rules of court governing execution against a judgment debtor's property afford such law.

[10] The notion that a debtor's property should be available to satisfy its debts is universally accepted. Execution does not occur arbitrarily. It takes place only after a court has by its judgment confirmed the existence of the obligation and authorised enforcement of compliance with it. Thereafter, a number of prescribed procedures have to be complied with before execution of the judgment is actually carried out. These include notice of to the judgment debtor of the attachment of the property, the ability of a judgment debtor in the ordinary case to point out the property that should be attached, advertisement and a public sale. The procedural requirements afford a judgment debtor adequate practical opportunity to avoid the sale of its property if it is able to redeem its indebtedness by other means.

[11] The relative importance of immovable property – something recognised by the Constitutional Court in *Wesbank* (see sub-para (e) in para. 100) – is acknowledged in the provision that ordinarily execution must occur against movables, and only when those have been excussed may the judgment creditor proceed against immovable property. The position is different, when, as in the current matter, the court had declared the immovable property to be directly executable, but that invariably occurs when the debtor has bound itself to submit to such an order – usually in the context of having mortgaged the property. There is nothing arbitrary about that.

[12] Nor is the exposure of the property to execution something that happens arbitrarily. It is always founded on some underlying liability by the judgment debtor. A judgment debtor who undertakes contractual liability voluntarily undertakes the risk that breach of or failure to perform in terms of the contract may have adverse proprietary consequences. A property owner who does some wrong to a third party that gives rise to delictual liability is similarly itself responsible for exposure of its property to execution if it is not willing or able voluntarily to settle the resultant liability in compensatory damages.

[13] There will always be a risk when a sale is forced, rather than voluntary, that the price realised will be less, sometimes considerably so, than the owner might have been able to achieve by private treaty. But the proper ordering of the judicial process would be rendered ineffectual if the execution of judgments were to be made subject to the debtor's disposition of attached property by private treaty; cf. *Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd and Another* 2014 (1) SA 168 (WCC). Save in a case in which some improper collusion or ulterior purpose is engaged, the execution creditor will have a corresponding interest with the judgment debtor in realising the property for an amount that will at least cover the judgment debt. The rules specifically provide that the sheriff, as the judicial salesperson, must be a disinterested party in the transaction. These factors militate against any conclusion that the deprivation of property pursuant to rule 46 is arbitrary. If a situation should arise in which a manifest injustice arose out of the peculiar circumstances of a sale in execution, there is nothing to prevent the judgment debtor from seeking appropriate relief. As the judgment in *Firm Mortgage Solutions* supra illustrates, such cases would be exceptional. That the realised price was disadvantageous would not be sufficient.

[14] The introduction of a requirement that a sale in execution had to be subject to a market value related reserve price might have some societal value. One thinks particularly in this regard of sales of immovable property that is the judgment debtor's home. Something can be said in favour of the argument that such a requirement in those cases would promote the rights under s 26 of the Constitution. But those are policy questions. The introduction of such policy would require consideration of a number of related factors, including the cost of enforcement measures and the impact of any increase thereof on the availability of credit. Some means would have to be devised to deal with cases in which the reserve was not realised. The possibility of the implementation of such a policy and its merits and demerits have no bearing on the determination of whether the law as it stands gives rise to an arbitrary deprivation of property. The current regime might be amenable to improvement, but it affords an adequately rational connection between ends and means.

[15] For these reasons I have not been persuaded that rule 46 in general, or sub-rule 46(12) in particular, permits arbitrary deprivation of property, whether substantively or procedurally.

[16] Notwithstanding the application's character as a purported assertion of a fundamental right under the Bill of Rights I do not think in the peculiar circumstances of the case that there is any reason why costs should not follow the result. The application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court