REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Date heard: 17 May 2011
Date delivered: 31 May 2011

In the matters between:

FIRSTRAND BANK LIMITED Plaintiff/Execution Creditor

and

Case No.: 1837/07
ELWIN BRUCE WOODS First Defendant/Execution Debtor

DELRAY GAYNOR WOODS Second Defendant/Execution Debtor

Case No.: 1254/08
CEDRIC PERCY PAGE Defendant/Execution Debtor

Case No.: 2229/08
PHAKAMILE MICHAEL MADWARA Defendant/Execution Debtor

Case No.: 121/09
RECARDO NOLAN FORTUIN First Defendant/Execution Debtor

DEBORAH BRIDGITTE FORTUIN Second Defendant/Execution Debtor

Case No.: 1855/09
WARREN VENTER First Defendant/Execution Debtor

ALIDA KAREN VENTER Second Defendant/Execution Debtor

Case No.: 2533/09
CORNELIUS JACOB MEIRING Defendant/Execution Debtor

Case No.: 722/09
BARRY ANDREW CALLAGHAN Defendant/Execution Debtor

Case No.: 1866/10
SHARON LIZETTE MARKS Defendant/Execution Debtor

Case No.: 2637/10

CHRISTO ALBERT SWART Defendant/Execution Debtor

Case No.: 1669/07
DIAL BAKERS First Defendant/Execution Debtor

JESSICA BAKERS Second Defendant/Execution Debtor

Case No.: 1172/09
JONATHAN BARRY CORNWELL Defendant/Execution Debtor

Case No.: 2532/09
THABO MASISI Defendant/Execution Debtor

Case No.: 3030/09
CLARK COETZEE Defendant/Execution Debtor

Case No.: 3675/09
ANDREW LAWRENCE MILNE First Defendant/Execution Debtor

NICOLE LERM Second Defendant/Execution Debtor

AND

In the matter between:

Case No.: 2327/11

NEDBANK LIMTED Plaintiff/Execution Creditor

and

MZIMASI VINCENT BOYCE First Defendant/Execution Debtor

NOLWANDILE PATRICIA BOYCE Second Defendant/Execution Debtor

J U D G M E N T

DAMBUZA, J:

[1] In each of the matters before me the plaintiff (execution creditor) seeks to confirm an order granted by the registrar of this court declaring executable immovable property belonging to the defendants (execution debtors). The plaintiff also seeks an order confirming and declaring to be valid the attachment in execution of the immovable property consequent to the order of the registrar.

[2] Although 17 cases served before me on 17 May 2011, only one matter, Case No. 1837/07, was argued. Mr *Scott* who appeared on behalf of the plaintiff (Firstrand Bank Limited) in all except one matter and Ms *Zietsman* who appeared on behalf of Nedbank (Case No. 2327/07) were content that as the relief sought in each of the other matters is the same as that sought in Case No. 1837/07 and the circumstances of the matters are similar, argument would only be heard on Case No. 1837/07. This judgment is therefore based on the submissions made specifically in respect of Case No. 1837/07.

[3] In Case No. 1837/07 the order declaring the defendants' property executable was made by the registrar, in default of the defendants, on 21 September 2007, subsequent to summons having been served on the defendants on 29 August 2007. The defendants are married to each other in community of property. In the summons the plaintiff claims a sum of R803,396.26 and interest thereon due by the defendants "*……by reason of the Defendants' failure or neglect to pay either promptly or at all the instalments that fell due under the said bonds*".

[4] Robert Freeborough, the plaintiff's Operations Manager states in an affidavit filed in support of this "application" that when judgment was granted (in 2007) the instalment in respect of the bond account relating to this matter was R8,783.74 and the arrears were R35,510.23. Pursuant to the attachment in terms of the order, sales in execution were arranged for 13 December 2007, 10 April 2008, 17 July 2008, 20 November 2008, 12 March 2009, 21 January 2010, 17 June 2010 and 24 March 2011. In each instance the sale in execution was cancelled because substantial payments were made into the account and payment arrangements were made with the Defendants. In respect of the last of the sales in execution, which was scheduled for 24 March 2011, the arrangement made with the defendants was that the arrears owing at that time would be paid in full by 28 March 2011. There is no indication however as to how much such arrears amounted to. But on 25 March 2011 the defendants paid R8,000.00 into the bank account. This amount did not clear the arrears. No payment was made thereafter and the arrears escalated to R14,358.51. Since then the plaintiff has tried, on numerous occasions, to communicate with the defendants by telephone, to no avail. There is no evidence as to whether the defendants are aware that default judgement was granted against them and that their property was attached pursuant thereto.

[5] The relief sought by the plaintiff was prompted by the amendment, on 24 December 2010, to Rule 31(5)(a) and (b)(i), read with Rule 46(1)(a)(ii) of the

Rules of this Court together with the judgment of the Constitutional Court in **Gundwana v Steko Development CC and Others** (CCT 44/10) [2011] ZACC 14 (11 April 2011).

[6] As a result of the amendment Rule 46(1) now reads:

> "(a) No writ of execution against the immovable property of any execution debtor shall issue until-
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> (i) a return shall have been made of any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
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> (ii) such immovable property shall have been declared executable by the court or, in the case of a judgment granted in terms of rule 31(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."

[7] In **Gundwana** *(supra)* the Constitutional Court held that:

> "… it is unconstitutional for a Registrar of a High Court to declare immovable property specially executable when ordering default judgment under 31(5) of the Uniform Rules of Court to the extent that this permits a sale in execution of the home of a person".[1]

[1]Paragraph [65]b. of the judgment.

[8] The background leading to the amended Rule 46 is set out in **Gundwana** *(supra)* in which **Froneman J** refers, amongst others, to **Jaftha v Schoeman & Others**[2]; **Van Rooyen v Stoltz & Others**;[3] **Gerber v Stolze and Others**;[4] **Nedbank Ltd v Mortinson**.[5] During argument I was referred to **Nedbank Limited v Fraser and Another**[6] in which **Peter AJ** also traces the developments with regard to orders declaring immovable property, particularly property which is a person's home, executable, from the period prior to 1903 until the amendment of Rule 46. In essence prior to 1903 the authority to declare movable property executable was a function of the Courts. In 1903 the Rules were amended to authorise the registrar to issue a writ against immovable property where an attempt at executing against movable property proved fruitless. An immovable property could be declared executable at judgment stage where it was specifically hypothecated for debts in respect of which the money judgment was obtained. In 1991 section 27A of the Supreme Court Act, Act No. 59 of 1959 was introduced, followed by Rule 31(5) in 1994.

[9] In terms of section 27A of the Supreme Court Act:

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[2] 2005 (2) SA 140 (CC)

[3] 2005 (1) BCLR 78 (CC)

[4] 1951(2) SA 166 T

[5] 2005 (6) SA 462 (W)

[6] An unreported decision of the South Gauteng High Court, Case No 2011/00418, delivered on 4 May 2011.

"A judgment by default may be granted and entered by the registrar in the manner and in the circumstances prescribed in the Rules made in terms of the Rules Board for Courts of Law Act, 1985 (Act No 107 of 1985), and a judgment so entered shall be deemed to be a judgment of the court."

[10] Rule 31(5)(a) and (b) provide that:

"(5) *(a)* Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

(b) The registrar may-

(i) grant judgment as requested;
(ii) grant judgment for part of the claim only or on amended terms;
(iii) refuse judgment wholly or in part;
(iv) postpone the application for judgment on such terms as he may consider just;
(v) request or receive oral or written submissions;
(vi) require that the matter be set down for hearing in open court.

[11] In **Gundwana, Froneman J** remarked, amongst others, that the judgment (**Gundwana**) restores to the courts, *"a function that they exercised for close on a century before the introduction of Rule 31(5) in 1994."* [7]

[7]Paragraph 53 of the judgment.

[12] During argument it was not in dispute that the order made by the registrar on 21 September 2007 is a judgment of the Court. I then raised with *Mr Scott* two issues which concerned me. This first was the nature of the relief sought in view of the fact that the order is, for all intents and purpose, a judgment of the court. I inquired about the procedure in terms of on which the matter was enrolled by the plaintiff. The second issue was the failure by the plaintiff to give notice to the defendants that it intended approaching the Court to seek reconsideration of the order of the registrar.

[13] Regarding the first issue it is clear that the court process in this matter had long been finalised. Then, almost four years thereafter the plaintiff set the matter down in terms of Rule 31(5)(d), for confirmation of the order granted by the registrar on 21 September 2007.

[14] Rule 31(5)(d) provides that:

> "Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by court".

[15] As I have stated the plaintiff was prompted by the judgment in **Gundwana** to set the matter down as it did. The plaintiff's case in this regard, as I understand it is that, because of the amendment to the Rules and the judgment in **Gundwana**, it became uncertain as to the status of the order granted by the registrar. The aim, in seeking confirmation of the order is to *"obviate the situation*

arising whereby a debtor brings an application for rescission of the judgment after the Execution Creditor has sold the immovable property in execution, thereby occasioning prejudice not only to the Execution Creditor, but also to any third party to whom the property is sold", so it was submitted .[8]

[16] Firstly, in my view the plaintiff is not a "dissatisfied party" as envisaged in Rule 31(5)(d). It seems to me that it is because of the plaintiff's satisfaction with the order that it wants to "fireproof" it to eliminate or at least reduce chances that it may be challenged. I am not aware of any procedure in this court which provides for the court to confirm its own judgments. A situation in which parties would be allowed to prevent judgment debtors from approaching court to seek rescission of default judgments granted against them, by having by having such default judgment confirmed, as the plaintiff presently seeks to, would, in my view, be untenable. The fallacy in bringing this matter before court in terms of Rule 31(5)(d) becomes even more evident in the plaintiff's explanation for failure to set the matter down within the 20 day period stipulated in Rule 31(5)(d). Contrary to the provisions of Rule 35(1)(d) the plaintiff has known of the order for a number of years and did not seek reconsideration thereof because it was satisfied with it. In my view Rule 31(5)(d) does not provide for circumstances such as found in this matter.

[8] Paragraph 8 of the plaintiff's written Heads of Argument.

[17] In any event **Froneman J** in **Gundwana** deals conclusively, in my view, with such fears and uncertainty as expressed by the plaintiff. At paragraphs [57] and [58] of **Gundwana** the Learned Judge states that:

> [1] "[57] But what about retrospectivity? In *Jaftha*, this Court placed no limit on the retrospectivity of its order. The declaration of invalidity of the legislative provisions in that matter did not entail, however, that all transfers made subsequent to invalid execution sales were automatically invalid. Individual persons affected by the ruling still needed to approach the courts to have the sales and transfers set aside if granted by default. This was made clear in *Menqa and Another v Markom and Others*. A similar approach should be followed here.
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> [1]
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> [2] [58] There may be a fear that the decision in this matter will lead to large-scale legal uncertainty about its effects on past matters where homes were declared specially executable by the registrar and sales in execution and transfers followed. The experience following *Jaftha* may be an indication that this fear is overstated. It must be remembered that these orders were issued only where default judgments were granted by the registrar. In order to turn the clock back in these cases aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable is not sufficient to undo everything that followed. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier and they will have to set out a defence to the claim for judgment against them. It may be that in many cases those aggrieved may find these requirements difficult to fulfil."

[18] It was submitted, in the alternative, that this Court can grant the relief sought in terms of its inherent jurisdiction under the Constitution, to protect and

regulate its own process in the interests of justice.[9] Indeed the courts have, in the past, used their inherent authority by making "extra-ordinary" orders to regulate its own procedures in the interests of proper administration of justice.[10] But I am not satisfied that the order in question requires special protection. Further, I cannot find that the anticipated application for rescission would undermine or frustrate court procedures. In any event I remain doubtful as to whether the order sought could validly prevent the defendants from seeking rescission of the order granted by the registrar and in my view it would not be in the interest of justice to grant the order sought.

[19] Regarding the failure to give notice Mr *Scott* submitted that because the defendants never responded to the summons with which they were served in 2007, there is no obligation on the plaintiff to alert them that it is approaching court to seek confirmation of the order. I have, in paragraph [3] above, set out what, according to the plaintiff, happened subsequent to the granting of the order by the registrar. The continued payments by the defendants under the bond account subsequent to the granting of the default judgment occurred in a number of the other matters that were before me.[11] The same issue was also before the

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[9]Section 173 of the Constitution Act, Act 108 of 1996 provides that:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[10]**Universal City Studios Inc. v Network Video (Pty) Ltd** 1986 (2) SA 734 (A) and **Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza** 2001 (4) SA 1184 (SCA).

[11]In particular in Case Nos. 2533/09; 3675/09 and 2327/07. There is no evidence of any payment having been made subsequent to the granting of the order in the rest of the matters.

Constitutional Court in **Gundwana**. However the Court, in **Gundwana**, left the issue open and only remarked as follows:

> [3] "[61] The applicant alleges that she continued to make payments on the bond over a period of approximately four years and that the Bank accepted those payments without letting her know that they were inadequate or unacceptable or that they had obtained default judgment against her. She argued that the Bank could not, under those circumstances, simply proceed in 2007 with an execution order and writ obtained in 2003. It was argued that this amounted to a compromise that novated the judgment debt, or, if not, something less that at least precluded execution without giving her some form of a hearing before proceeding. Alleged abuse of the execution process after granting the order is of a different kind from that following upon a constitutionally invalid process. This is not an issue for us to decide, but it may become an issue in the rescission application and eviction proceedings."

[20] Because of the view I hold regarding the propriety of relief sought by the plaintiff and the procedure in terms of which the matter was enrolled, I consider it unnecessary to make a finding on the issue of failure to give notice. More so as there is no evidence on whether or not the defendants are aware of the order granted by the registrar. But the following is stated in Erasmus; **Superior Court Practice**:[12]

> "The subrule (31(5)(d)does not contain any explicit directions as to the manner of set down. It is, however, clear that set down of a matter for reconsideration by the court will have to be on notice to the other parties to the action. It is accordingly submitted that such set down is, *mutatis mutandis* , to be in accordance with

[12]At B-204D

subrule (4), that is, upon not less than five days' notice to the other parties concerned."

[21] During argument Mr *Scott* brought it to my attention that orders of the same nature as sought by the plaintiff have been granted in the Western Cape Division. However there does not seem to be any judgment in that regard and I am therefore not aware of the considerations that motivated the granting of such orders.

[22] Although it is not clear from the papers, I can only assume that this matter is set down as an application.

[23] The order I grant therefore is that:

[23.1] The application is dismissed.

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N. DAMBUZA
JUDGE OF THE HIGH COURT

In matters:

1837/07, 1254/08, 2229/08, 121/09, 1855/09, 2533/09, 722/09, 1866/10, 2637/10, 1669/07, 1172/09, 2532/09, 3030/09, 3675/09

For Plaintiff/Execution Creditor:

Adv P.W.A. Scott instructed by Spilkins of Port Elizabeth.

For Defendants/Execution Debtors:

No appearance

In matter:

2327/07

For Plaintiff/Execution Creditor:

Adv T. Zietsman instructed by Pagdens of Port Elizabeth.

For Defendants/Execution Debtors:

No appearance