REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30241/2016

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED.

12/10/18
Date:

WHG VAN DER LINDE

In the matter between:

Kodona Ndzoko — Applicant

and

Willy Kalakala — Respondent

Judgment

Van der Linde, J:

Introduction

[1] This is an application for leave to execute the respondent's two immovable properties known as Erf 132 Bassonia, Rock Extension 13, and as Erf 3207 Glen Vista, Extension 6, both executions being sought in satisfaction of a judgment debt of the respondent in favour of the applicant. Both parties are legally represented, the applicant by Adv Rourke and the respondent by attorney Neshavi.

[2] The applicant is an adult female who lives in the United Kingdom. She and the respondent entered into a written agreement of sale on 23 March 2015 whereby the respondent sold

the properties situate at Stand 1591 Rosettenville Extension, 62 Berg Street, Rosettenville, to the applicant. A deposit of R430 000,00 was payable as a portion of the aggregate purchase price of R610 000,00. The applicant paid R464 100,00 to the respondent on 23 March 2015; R55 800,00 on 17 May 2015; R20 400,00 on 3 September 2015, totalling R540 300,00 in all.

[3] It turned out that the respondent was in fact not the owner of the property and could not give registration of transfer of the property to the applicant. On 1 August 2016 a breach notice was sent by the applicant to the respondent, who did not rectify the breach, and on 18 August 2016 a notice of a cancellation was served on the respondent. The respondent thereupon became obliged to return the R540 300,00 to the applicant but did not do so.

[4] On 1 September 2016 the applicant sued the respondent for payment of that amount and on 25 October 2016 this Court gave a default judgment against the respondent in favour of the applicant. The judgment debt remains unpaid. The applicant thereafter issued a writ against the immovable property of the respondent but on 30 March 2017 the Sheriff returned a *nulla bona*.

[5] The applicant explains that the respondent owns the two immovable properties referred to at the outset of this judgment. Those properties are unencumbered. The respondent does not, according to the applicant, live in any of the two properties and therefore they are not his primary residence. The applicant says that the property at Erf 132 Bassonia Rock is probably worth R350 000,00 and that at Erf 3207 Glen Vista, R550 000,00. In other words, the property at Erf 3207 Glen Vista is worth R10 000,00 more, give or take, than the aggregate capital value of the default judgment at R540 300,00.

[6] The applicant is no expert in the valuation of immovable property, and nothing of moment can be placed on her opinions in this regard. I return to this issue below.

<u>The affidavits</u>

[7] In the founding affidavit the applicant drew the respondent's attention to section 26(1) of the Constitution, and the respondent was invited to put relevant information before the Honourable Court, if it was his contention that the two properties being declared executable would infringe his constitutional right to access to adequate housing. The respondent's attention was also drawn to section 26(3) of the Constitution, whereby no person may be evicted from their home without an order of court, made after considering all the relevant circumstances. Again, the respondent was invited to place relevant information before the court. The applicant pointed out that the judgment debt as of 18 May 2017 amounted to R581 835,56, but says that it accumulates daily with regards to interest and costs.

[8] In his answering affidavit the respondent said that the applicant was obliged to put up security because she is a resident in the United Kingdom and not an *incola* of the court. He argued also that the notice of motion is fatally defective because it does not deal with or draw his attention to the required sections of the Constitution.

[9] More substantively, he says that he resides at the property known as Erf 132 Bassonia, being the one supposedly valued at R350 000,00; and that his partner and mother of his five children, Yvonne Kalala, resides at the property known as Erf 3207 (the one supposedly valued at R550 000,00).

[10] He explains in his answering affidavit that he is a business owner of a business which comprises the purchasing of immovable properties and then reselling them at a profit. He says a large portion of his business consists of dealing in immovable properties acquired from sales in execution by the Sheriff. He explained that he on sales at a margin properties bought by him at a sale in execution; and then when transfer is to be effected, he arranges for a simultaneous transfer first from the Sheriff to him and then from him to the purchaser of the property concerned.

[11] He says that he intends to apply to rescind the default judgment given against him and that:

"I am currently raising funds in order to instruct an attorney ..."

[12] As to the *nulla bona* return of service, he says that the Sheriff did not attend his residence, and did not make an inventory of his movable goods. The Sheriff did however present him with a document that he was required to sign and he says that he did not understand what he was signing; he now understands that it was a *nulla bona*.

[13] As to his personal circumstances he says that he resides at the Bassonia property and Yvonne Kalala resides at the Glen Vista property. Five minor children live, *"both with myself and Yvonne at our respective homes"*. He concludes therefore that both properties are primary residences. He admits that he does owe the applicant *"a certain amount of money"*, but such amount was still to be computed and says that he would deal with this in his rescission application.

[14] He says these properties should not be declared executable, because he suggests a payment plan in instalments as an alternative. Because there are, according to him, alternative means of satisfying the judgment debt, the execution of the two properties will infringe his rights under section 26(1).

[15] In the replying affidavit the applicant explains that the respondent's answering affidavit was way out of time, and that he only filed an answering affidavit after the matter had been set down for 24 October 2017. This fitted the pattern that the respondent employed: this application for the declaration of executability was originally set down for 25 August 2017, and it was only on 17 August 2017 that the respondent filed a notice to oppose (nearly a month out of time) so as to avoid judgment being taken against him. She points out that the respondent has not paid any portion of the debt owed to the applicant.

[16] The applicant berates the respondent for making vague allegations of endless settlement suggestions but in fact he did not take the court into his confidence by furnishing details of these suggestions. He argues that the respondent is accordingly not *bona fide*.

The parties' submissions

[17] The applicant argues in her heads of argument that the respondent is not as of right entitled to security for costs. With reference to *HR Holfeld (Africa) Limited v Karl Walter and Co GmbH* 1987 (4) SA 861 (W) the applicant argues that security for costs of an action which had been finalised by an earlier judgment could not be ordered under Rule 47 in subsequent proceedings arising out of that judgment. As such, the respondent in this matter ought not to be granted its request for security for costs.

[18] The applicant also argues that her founding papers expressly drew the attention of the respondent to his rights in terms of the Constitution. The applicant submits that it is just and equitable that the Bassonia and Glen Vista properties be sold to pay the judgment debt.

[19] I agree with the applicant's submissions on these two points, as also with the submission that the sheriff's return of service constitutes prima facie evidence of the truth of its contents; and that the respondent has not disturbed this.

[20] As to whether the respondent, his partner, and their five minor children occupy the properties, the applicant draws attention to the fact that nowhere does the respondent explain why he and his partner and their five minor children should reside at different residences.

[21] In her heads of argument the applicant also draws attention to the requirements laid down in the various cases that have to be followed before immovable property which is a primary residence, should be declared executable. The applicant refers to *Jaftha v Schoeman; Van*

Rooyen v Stoltz, 2005 (2) SA 140 (CC) at 161I to 163B. She refers also to *Firstrand Bank Limited v Folscher and Another, and Similar Matters,* 2011 (4) SA 314 (GNP) at 332C to 333D.

Discussion

[22] The real issue that arises in this case is whether this Court has discharged its duty under section 26(3) of the Constitution, to investigate whether there are means to pay the judgment debt other than to execute on the immovable property of the respondent. A court is able to do so when a respondent such as this one, who is clearly well informed and literate, had an opportunity to place his personal circumstances before the court in his answering affidavit.

[23] If it is argued that in this case the respondent did not go far enough in providing the required detail to the court, then it seems to me that it is the respondent who bears the risk of a court concluding that the court has done that which it reasonably can to enquire into the personal circumstances of the respondent, for purposes of section 26(3) of the Constitution.

[24] In this case, absent a proper explanation by the respondent as to why he lives in one property, his partner in another property, and their five children share both the properties, there is so much more that the respondent could have said but did not. One does not know what the improvements are on each of these two properties; what the living arrangements are on them; whether or not the respondent and his partner and their five children cannot live in one of the properties; what the likely realisation price would be of the two properties concerned whether it to be sold in execution; and, most importantly, the following consideration.

[25] This is that the respondent has given no detail whatsoever about his financial resources, nor of that of his partner. One does not know what his income is; one does not know what the settlement proposals are that he has made; and importantly he has not in this matter

actually made any settlement proposals at all. He was chosen instead vaguely to suggest that settlement proposals were and could be made, thereby obviating the need to sell the two properties concerned in execution.

[26] The new Rule 46A applies to execution against residential immovable property. Under Rule 46A(5) an application such as the current one must be supported by documents evidencing the market value of the immovable property sought to be declared executable; the local authority valuation of the immovable property; the amounts owing on mortgage bonds registered over the immovable property, the amount owing to the local authority as rates and other dues; and any other factor which may be necessary to enable the court to give effect to the duty of the court under Rule 46A(8). Under that subrule a court may order the furnishing by a municipality of rates due to it by the judgment debtor; and importantly it may set a reserve price.

[27] In deciding whether or not to set a reserve price the court must, under Rule 46A(9)(b), take into account the market value of the property; the amounts owing as rates or levies; and any equity which may be realised between the reserve price and the market value of the property. The court also is given the express power to postpone the matter on such terms as it deems fit.

[28] What operates one's mind in this matter is why the sale in execution of the Bassonia property (the one supposedly valued at R350 000,00) should not be stayed, pending the execution of an order declaring specially executable the property at Glen Vista, which is currently estimated as R550 000,00 in value whereas the judgment debt is R581 835,56, only some R30 000 more. True, that was the judgment debt as of 18 May 2017 and interest would have accumulated; but the value of the Glen Vista property may in fact also be more than R550 000,00. Absent proper evidence concerning the value of that property, including the municipal value, it is not possible for this court to fix a reserve price.

[29] Further, it may be that if an order is granted declaring specially executable the Glen Vista property only, the respondent may be spurred into paying the margin between the value of the Glen Vista property as realised at a sale in execution, and the judgment debt, in cash. On the other hand, if the Glen Vista property does not realise sufficient value, or close to sufficient value, at a sale in execution, it would still be open to a court then to decide whether to declare executable also the Bassonia property.

[30] In these circumstances I stood the matter down until Friday, 12 October 2018 to enable the applicant to obtain proper evidence about value.

[31] When the matter was called today, both parties were represented as before. The applicant handed up without objection an email exchange with the respondent from which it appears that the applicant asked the respondent for municipal accounts of the two properties; valuations by himself as estate agent, of the two properties; and confirmations that the addresses were correct. This was to no avail.

[32] The applicant also handed up a supplementary affidavit (which had been served by email on the respondent) which explains the results of a Windeed search, from which it appears that in fact the Bassonia property has been sold, contrary to the respondent's explanation in his affidavit.

[33] It also appears that the respondent is still the owner of the Glen Vista property, the one in which he says his partner and their five children live (it will be recalled that he said he himself lived in the Bassonia property, in his affidavit which was dated October 2017). Its municipal valuation is R803 000, its estimated value is R2750000, and its low value is R2170000.

[34] The respondent's representative when asked had nothing further to add to the facts disclosed in the applicant's supplementary affidavit.

[35] It is uncertain, given the further facts now disclosed, whether the Glen Vista has since become the respondent's primary residence; or whether he still resides in the Bassonia property despite having sold it. I have concerns also about the sparse information provided by the respondent, as I have explained above.

[36] In the circumstances it appears to me to be fair to declare only the Glen Vista property specially executable, fixing a reserve price of R 1 000 000. I arrive at that rounded figure by calculating the mean of the municipal value and the low value, and then subtracting 30%.

[37] I believe also that I should suspend the operation of this order for three months to enable the respondent to make alternative residential arrangements for his family.

[38] In these circumstances I make the following order:

(a) The immovable property known as Erf 3207 Glen Vista Ext 6, held by the respondent under deed of transfer T.50602/2014 is declared specially executable.

(b) The sheriff of the High Court of South Africa is authorised, empowered and directed to sell the said property in satisfaction of the judgment debt owed by the respondent to the applicant.

(c) A reserve price of R 1 000 000 is to be set for the sale of the property.

(d) Should the reserve price not be achieved within the first three auctions, the Sheriff is authorised to sell the said property without a reserve price.

(e) The respondent is ordered to pay the costs of this application.

(f) The execution of this order is suspended until 12 January 2019.

WHG van der Linde
Judge, High Court
Johannesburg

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