

REPUBLIC OF SOUTH AFRICA



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

**CASE NO: A3032/2022
Court a quo CASE No. 6948/2019**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

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DATE

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SIGNATURE

**THE BODY CORPORATE OF RIVERSIDE LODGE
SECTIONAL SCHEME**

Applicant

and

**NTABAEKONJWA PROP DEVELOPMENTS (PTY) LTD
(Reg No. 2006/009133/07)
[In Liquidation]**

Respondent

J U D G M E N T

MOKUTU AJ

INTRODUCTION

1. The appellant, is the Body Corporate of Riverside Lodge, Sectional Scheme a body corporate duly registered as such in terms of the Sectional Titles Act 65 of 1986 (“the Sectional Titles Act”). The respondent, is Ntabaekonjwa Prop Developments (Pty) Ltd [in liquidation], a juristic person and a registered owner of a unit described as section 63, (door No. 65), Riverside Lodge 100, Waterford Road, Maroeladal (“the property”).

2. The appellant approaches this Court by way of an appeal, following the Magistrate’s Court’s dismissal of its application to declare the property specially executable, owing to the respondent’s failure to pay the initial amount of R29 797.06, together with interest calculated at the rate of 10 percent per annum from 7 May 2016 until the date of payment. The respondent is not opposing the appeal.

3. The appellant initiated action proceedings in the Randburg Magistrates Court against the respondent. The appellant’s cause of action was predicated on the respondent’s failure to pay contributions that were levied by or on behalf of the appellant. Section 3(2) of the Sectional Titles Schemes Management Act 8 of 2011 (“STSMA”) *inter alia* provides that a failure on the part of the owner of a unit to ensure that the payment of any contribution levied pursuant to section 3(1) of STSMA, may result in legal

action being taken against such owner to recover any such amount(s) due by such owner.

4. Rule 25(4) of the Rules promulgated pursuant to section 10 of the STSMA confers a statutory obligation on the owner of a unit to pay all reasonable costs and disbursements as taxed or agreed to. The respondent as the owner of the unit was bound by the Rules and obliged to pay the costs. The respondent failed to pay the amounts raised on a monthly basis.
5. In the result, the appellant initially sought payment in the sum of R29 797.06, together with interest to be calculated at the rate of 10 percent per annum from 7 May 2016 until the date of payment. There was no opposition to the appellant's action and application to declare the property specially executable in the Court *a quo*.
6. The appellant obtained default judgment and an order against the respondent for the payment of the amount of R29 797.06, together with interest to be calculated at the rate of 10 percent per annum from 7 May 2016 until the date of payment.
7. Notwithstanding several attempts to serve the initial summons and particulars of claim, the Sheriff was unable to effect "*personal*" service on the respondent or on respondent's authorised agents or officials on

account of the property being found locked by the Sheriff at all material times.

8. At some point when the Sheriff effected service of the warrant of execution on the property there was a certain James Molefe (“Mr Molefe”) in occupation of the property.
9. The appellant, through the Sheriff, was unable to discern whether Mr Molefe had occupied the property at the behest of the respondent. Mr Molefe is however not the registered owner of the property.
10. The Magistrate seized with the application to declare the property specially executable was not satisfied that such an order could be granted where there was no “*personal*” service on the respondent.
11. Below, in this judgment, we deal with the crucial aspect of the juristic personality of the respondent viewed against the Court *a quo*’s finding that “*personal*” service should have been effected on the respondent.

ISSUES FOR DETERMINATION

12. At the heart of this appeal is whether the Court *a quo*:

- 12.1. was correct in dismissing the appellant's application to declare the property specially executable;
- 12.2. should have further investigated the matter by postponing such an application, before dismissing it; and
- 12.3. should have granted the order sought by the appellant.

THE LEGAL PRINCIPLES

13. Rule 9 of the Magistrates' Court Rules ("Magistrates' Court Rules") deals with service of process, notices and other documents in that Court. For present purposes, Rule 9(3)(a) provides that all process shall, subject to the other applicable provisions contained in the Magistrates' Court Rules, be served upon the person affected thereby by delivering a copy thereof to the said person personally or to such persons' duly authorised agent.
14. Furthermore, Rule 9(3)(d) of the Magistrates' Court Rules provides that if the person to be served has chosen a *domicilium citandi*, service may be effected by delivering a copy thereof at the *domicilium citandi* so chosen. There is an important proviso in Rule 9(3)(d) being that the Sheriff must set out in the return of service the details of the manner and circumstances under which such service was effected.

15. Rule 9(3)(e) of the Magistrates' Court Rules deals with service in the case of a juristic person, such as the respondent, and it is provided therein that service may be effected by delivering a copy to a responsible employee thereof at its registered office or principal place of business (within the Court's jurisdiction) *"or if there is no such employee willing to accept service, by affixing a copy to the main door of such office or place of business or in any manner provided in law"*.

16. According to Rule 43(3)(a) of the Magistrates' Court Rules, notice of attachment (of the property) must be served by the Sheriff upon the owner of the immovable property concerned and upon the Registrar of Deeds or other officer charged with the registration of that property and if the property is occupied by some person other than the owner, also upon such occupier.

17. Rule 43A of the Magistrates' Court Rules concerns itself with the requirements that must be satisfied by an applicant who seeks execution against residential immovable property. In terms of Rule 43A(2)(a)(i) and (ii), a Court considering an application to declare a property executable must:
 - 17.1. establish whether the immovable property, which is the subject matter of the application, is the primary residence of the judgment debtor; and

- 17.2. consider all alternative means by the judgment debtor, if any, of satisfying the judgment debt, other than execution against the judgment debtors' primary residence.

18. An important further requirement appears in Rule 43A(8)(d); (f); (g) and (i) of the Magistrates' Court Rules. In terms of the said Rule, a Court considering an application concerning the executability of an immovable property may make the following orders:
 - 18.1. order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;
 - 18.2. postpone the application on such terms as it may consider appropriate;
 - 18.3. refuse the application if it has no merit; or
 - 18.4. make any other appropriate order.

19. The law on executability against immovable property is settled. The starting point is to recall the sentiments expressed by the Supreme Court

of Appeal¹ that in all cases of execution against immovable property, judicial oversight is required and necessary.

20. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*² the Constitutional Court, amongst other things, summarised the pertinent principles that the Court must observe in adjudicating matters involving executability of immovable properties as follows:

“[40] ... it is not easy to adopt a uniform definition of the concept of a 'trifling debt'. What might seem trifling to an affluent observer might not be trifling to a poor creditor reliant on his or her ability to recover debts. Indeed, not all creditors are affluent and to many who use the execution process, it constitutes the only mechanism to recover outstanding debts.

[41] Another difficulty is that there may be other factors which militate against a finding that execution is unjustifiable. Such factors will vary according to the facts of each case. It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature.

¹ In *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA) para. 24 (approved by this Court in *ABSA v Mokebe* 2018 (6) SA 492 (GJ) at 516A – B.

² 2005 (2) SA 140 at 158E-159B.

[42] *The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process.*

[43] *However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the s 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable.*

[53] *... it would be inappropriate for this Court to attempt to delineate all the circumstances in which a sale in execution would not be justifiable. There are countless ways in which the facts of a case might differ and it would not be possible to anticipate all these permutations. An appropriate remedy should be sufficiently flexible, therefore, to accommodate varying circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure,*

but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home.

[55] It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. ...”

APPLICATION OF THE LAW TO THE FACTS

21. In my view, the Court *a quo* erred in dismissing the appellant’s application to declare the respondent’s immovable property specially executable. In the main, it is an important consideration that the respondent showed no interest whatsoever in defending the appellant’s claim.

22. Notwithstanding the respondent’s failure to defend the claim, the Court *a quo* was unable to ascertain the reason why the respondent opted not to file opposing papers in the Court *a quo*. As pointed out above, service of Court process either by affixing it to the door or serving the occupier of the relevant property is good service in terms of Rule 9(d) and (e) of the Magistrates’ Court Rules, despite the respondent’s failure to file a notice to defend or an answering affidavit.

23. The Court *a quo* did take cognisance of the respondent's failure to defend the appellant's claim. It failed to consider that the respondent placed no facts before it. On the facts before the Court *a quo* where the return of service was in accordance with the rules the court had to exercise its judicial oversight prior to determining whether it was appropriate to grant an order for special executability. In circumstances where: the return of service complied with the Rules; and the house was not the primary residence and the respondent failed to place other relevant factors before the Court there was nothing indicating the Court *a quo* should not grant and order for special executability.
24. Where the Court *a quo* had concerns about service, it could remand the matter with appropriate directions regarding service. It could seek better service, or direct that service be upon an address that the applicant knew would come to the attention of the respondent. This is useful where it is apparent that the property is occupied by a person other than the respondent suggesting it was not a primary residence.
25. The monthly levies that the appellant collects from the owners of immovable properties are provided for in terms of the legislation.³ The respondent knew or can be expected to have reasonably known of its statutory monthly obligations towards the appellant, yet the respondent refused and continues to refuse, to date, to effect monthly levies.

³ The Sectional Title Act and STSMA.

26. As at the date of dismissing the appellant's application to declare the property specially executable, the debt owing together with interest would have increased in favour of the appellant. In addition, the respondent also owes the City of Johannesburg Metropolitan Municipality for unpaid municipal rates and taxes.
27. The Court *a quo* has also, in my view, misdirected itself in having insisted that the appellant, through the Sherriff, ought to have effected "*personal*" service on the respondent. It is trite law that a juristic person, such as the respondent, can only act through its directors and/or its duly authorised agents. In *casu*, the respondent's sole director is Tebogo Phillip Bahlekazi, according to the Companies and Intellectual Properties Commission ("CIPC") record.
28. In circumstances where personal service on the agents of the juristic person concerned is not possible, service can and may be effected by affixing the Court process concerned on the main door at the registered address of the juristic entity concerned⁴.
29. The Court *a quo* erred in dismissing, the appellant's application to declare the respondent's property specially executable without postponing the matter to enable the applicant to address its concerns in view of the fact that the matter was unopposed.

⁴ Rule 9(3)(e).

The appropriate order, should have been to grant the order sought and not to refuse the application, since such application can only be refused if it has no merit.

30. The respondent was not in Court nor has the respondent filed an opposing affidavit to gainsay the appellant's averments made in the Court *a quo* and also in this Court. As at the date of dismissal of the appellant's application to declare the respondent's immovable property specially executable, the appellant was armed with a favourable judgment and order for the payment of outstanding levies that the respondent owed to the appellant.

REMEDY

31. Having considered the pleaded facts and the appellant's notice of appeal, it is appropriate to set aside the judgment of the Court *a quo*- and to declare the respondent's immovable property specially executable.
32. The costs order granted against the appellant was also unwarranted since the outright dismissal of the application was meritless in view of the nonchalant attitude adopted by the respondent.

ORDER

For the reasons above the following order is proposed:

1. The order of the Magistrate's Court including the costs order is set aside and replaced with the following order:
 - 1.1. the respondent's immovable property specially executable;
 - 1.2. the respondent is ordered to pay the costs of the litigation proceedings in the Magistrate's Court.

MOKUTU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree and it is so ordered

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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date of hearing: 3 November 2022

Judgment delivered: 28 November 2022

Counsel for Applicant: Adv S McTurk

Attorneys for Applicant: Otto Krause Inc Attorneys

Counsel for Respondent: No appearance

Attorneys for Respondent: No appearance