



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

(1) REPORTABLE: NO
(2) OF INTEREST OF OTHER JUDGES: NO
(3) REVISED

21/6/22

DATE

SIGNATURE

CASE NUMBER: 5837/2021

In the matter of

JAN VAN DEN BOS N.O

(In his capacity as Administrator of Pearlbrook Body Corporate)

APPLICANT

And

SINDANE DUDU MARIA (ADEWUMI)

FIRST RESPONDENT

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

SECOND RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] The applicant seeks the following order:

1. That the court declares the immovable property situated at Door number 22, Unit 10, Pearlbrook Complex, 30 Bruce Street, Hillbrow, Johannesburg (“**the property**”) registered under Title Deed ST41310/1999 specifically executable.
2. Ordering that a Writ of Execution be issued in respect of the property, as envisaged in terms of Uniform Rule 46(1)(a).
3. Ordering the first respondent to pay the costs of this application.
4. In the alternative to prayer 3 above and only in the event of the second respondent opposing the application, ordering such respondent to pay the costs of this application together with the first respondent on an attorney and client scale jointly and severally, the one paying, the other to be absolved.

[2] The first respondent opposed the application and raised the following *points in limine*;

1. That the applicant lacks *locus standi*,
2. That the application was not served on the first respondent, and
3. The bank account used by the applicant is in the name of PAL Property Management which account is unknown to the first respondent.

[3] The second respondent has been cited as an interested party and does not oppose the application.

Parties

[4] The applicant is Jan van den Bos N.O., acting in his capacity of administrator of Pearlbrook Body Corporate, registered under Sectional Title Scheme Number SS140/1983, a body corporate duly established in terms of Section 2(1) of the Sectional Titles Schemes Management Act 8 of 2011 (hereinafter referred to as the “**STSMA**”) and incorporated and registered in terms of Section 36(1) of the Sectional Titles Act 95 of 1985 (“**STA**”) with perpetual succession and is capable of suing and being sued in terms of Section 2(7) of the STSMA.

[5] The first respondent is Sindane Dudu Maria, an adult female, with her current place of residence and chosen domicilium citandi et executandi at Unit 10 in the Scheme known as Pearlbrook Body Corporate, Scheme Number SS140/1983, also known as Door Number 22, Unit 10, Pearlbrook Complex, 30 Bruce Street, Hillbrow, Johannesburg. (“**the property**”)

Background of relevant facts

[6] The property is registered in the name of the first respondent and forms part of the scheme. On 10 September 1997 the first respondent purchased the property for an amount of R 27 000. There is no bond registered over the property.

[7] In terms of section 2(1) of the STSMA, any person who becomes an owner of a unit in a sectional scheme, becomes a member of that particular body corporate *ex lege*, therefore, the first respondent is a member of the applicant. The first respondent is, therefore responsible for contributions to the applicant in terms of section 3(2) read together with section 3(1) of the STSMA.

[8] During 2019 the first respondent failed to pay levies owed to the applicant and during October 2019 the applicant sought payment of the arrear levies and other charges in the amount of R 155 106.60.

[9] The applicant issued a summons in the Johannesburg District Court under case number 21500/2019 for the recovery of amounts owing to the applicant.

[10] On 29 July 2020, judgment was granted against the first respondent for:

1. Payment of the sum of R 128 407.79;
2. Interest on the above amount at 24% (per centum) per month compounded monthly from 28 October 2019;
3. Costs on the attorney and client scale, which include VAT to be taxed.

[11] Pursuant to the court order the applicant caused a warrant of execution against the movable property to be issued against the first respondent in order to recoup the judgment debt.

[12] On 20 August 2020, the Sheriff Johannesburg Central rendered a return of non-service after attempting to execute the warrant of execution on the first respondent at her domicilium. Upon demand from the first respondent to make payment of the judgment debt the Sheriff found that the goods available could not satisfy the warrant. As a result, a *nulla bona* return was issued.

[13] On 18 January 2021 the applicant also drew a Columbus Profile Report in order to confirm whether the first respondent occupies the property or not. On both the Columbus and CSI Person Trace profiles the first respondent's latest residential address is reflected as 102 Lang Street, Rosettenville, Johannesburg. The said address was updated on the CSI person trace as recently as 31 December 2020.

[14] On 25 January 2021 the Sheriff Johannesburg Central, once again attempted to execute the warrant at the property, being the domicillium of the first respondent. However, the Sheriff was unable to attach any assets or to locate the first respondent as the property was occupied by Ms Sibongile Nyathi, a sub-tenant whom confirmed that the first respondent was no longer at the given address.

Submissions by the applicant

[15] Counsel for the applicant argued that in terms of the order granted on 23 August 2018 by Francis J, the applicant was appointed as administrator of Pearlbrook Body Corporate. The applicant contended that the wording of the order is clear, and the first respondent's allegation that the order states that the applicant's appointment is pending the finalisation of Part B of the said order, is wrong and misplaced.

[16] The applicant asserts that the proper interpretation of the order, would be indicative that the applicant was appointed in the interim, pending finalisation in Part B. This interpretation is further justified by the fact that the Francis J, furthermore, sets out and makes an order as to the applicant's competencies, duties, powers and obligations. Therefore, the applicant has the necessary *locus standi* to proceed with the application.

[17] The applicant argued that the property is not the primary residence of the first respondent. The applicant contends that on the date of the last attempted execution it was shown that the property was being occupied by a tenant, Ms Sibongile Nyathi, who informed the Sheriff that the first respondent was no longer residing at the property. Furthermore, a Columbus Profile Report indicates that the first respondent is resident at an alternative property in Rosettenville.

[18] The applicant argued that the money judgment stands and must be executed upon. It is apparent that there are no movable assets belonging to the first respondent, against which the judgment can be executed, and as such the applicant is entitled to an order declaring the property executable.

[19] Therefore, the applicant argued that the order prayed for should be granted.

Submissions by the respondent

[20] Counsel for the first respondent argued that the applicant lacks the requisite *locus standi* to act on behalf of the Body Corporate and to bring the application. The first

respondent relied on the fact that the order granted by Francis J on 1 August 2018, states the following;

“Jan van den Bos N.O. (**the administrator**) is appointed as administrator to the Respondent for a period from where a date obtained from the Court’s Honourable Registrar to hear Part B opposed and/or unopposed from a final appointment up to date of appointment in terms of the provisions of Section 16 of Act 8 of 2011 (**the Act**).”

[21] The first respondent further contended that at the time the applicant instituted proceedings at the Magistrate’s Court to recover the alleged outstanding levies against the first respondent, the applicant had no *locus standi* and this on its own invalidates the proceedings in the Magistrate’s Court and any proceedings brought by the applicant on behalf of the Body Corporate.

[22] It was further argued that the question of *locus standi* is a matter of Law and cannot be conferred on a litigant by consent or condonation of the Court, and further that *locus standi* is fundamental to due process, without which proceedings are invalid. Counsel stated that it is further trite that to establish *locus standi* one must show that he has a direct or substantial interest in the subject matter of the judgement.

[23] The first respondent asserts that in light of the above the applicant lacks the necessary *locus standi* to institute the application, because the court order on which it relies for his appointment does not affect such appointment, instead such appointment is postponed to when a date for hearing of Part B of that application is obtained, and this matter stands to be dismissed with costs due to lack of *locus standi*.

[24] In furtherance of her defence, the first respondent argued that she is currently in occupation of the premises and she considers the property to be her primary residence and should the property be declared specially executable she will be rendered homeless and destitute.

[25] Counsel for the first respondent argued that homelessness constitutes a valid defence in any application in which a litigant's right to housing stand to be affected. Thus, first respondent stands to be severely prejudiced if the order is granted as the potential sale of her property which she utilizes as a primary residence will render her homeless and destitute.

[26] Therefore, the first respondent argued for the dismissal of the application with costs.

Common Cause facts

[27] The following facts material to the application are common cause;

1. The first respondent is the registered owner of the property;
2. The property forms part of the sectional title scheme administered by the Pearlbrook Body Corporate;
3. As the registered owner of the property, being a unit within the scheme, the first respondent became a member of the body corporate by operation of law;
4. In terms of section 46(1)(h) of the Act the first respondent is legally bound to pay monthly levies to the Body Corporate,
5. The first respondent failed to make levy payments to the Body Corporate since February 2014,
6. The applicant obtained judgment against the first respondent ("**the judgment**") on 29 July 2020, in the Johannesburg District Magistrates Court under case number 2019/21500, for:
 1. Payment of the sum of R 128,407.79;
 2. Interest on the above amount at 24% (per centum) per month compounded monthly from 28 October 2019; and
 3. Costs on the attorney and client scale, which include VAT to be taxed.
7. The arrears currently amounted to R 202 770;
8. The municipal value of the property is R 182 000; and
9. The municipal rates and taxes are R 426.72

Points in limine raised by the first respondent

First point in limine

[28] The first respondent challenges the applicant's appointment as administrator of Pearlbrook Body Corporate, and thus argued that the applicant does not have the necessary *locus standi*.

[29] Therefore, so it is argued, the application to declare the property executable should be dismissed, due to lack of *locus standi*.

[30] Counsel for the applicant asserts that Francis J on 1 August 2018 appointed the applicant as administrator of the Pearlbrook Body Corporate, and therefore the first point *in limine* stands to be dismissed.

[31] In terms of Part A of the said court order the following is ordered;

“Pending the finalization of the matter to be heard under Part B of the application.

1. Jan van den Bos N.O. (“the administrator”) is appointed as administrator to the respondent [Pearlbrook Body Corporate] for a period, from where a date obtained from the Court's Honourable Registrar to hear Part B opposed and/or unopposed, from a final appointment up to date of appointment in terms of the provisions of section 16 of Act 8 of 2011 (“the Act”)...”

[32] In my view it is evident from the wording of the order; Part B has been postponed *sine die* and the applicant was appointed as administrator pending the finalization of Part B. The said order also sets out the applicant's competencies, duties, powers and obligations.

[33] It is important to note that the order was not set aside by any court and therefore must be adhered to. The first respondent did not oppose the application of appointment and therefore, in my view, she is bound by the order granted by Francis J.

[34] Therefore, I am satisfied that the applicant has the necessary *locus standi* in the application before me.

[35] As a result, the first point *in limine* is dismissed.

Second point in limine

[36] The first respondent argued that the summons and the judgment order obtained in the Johannesburg District Court were not served on her and as such she has no knowledge of the order granted.

[37] Counsel for the applicant argued that the first respondent at all times was aware of the summons issued and the judgment order.

[38] It is evident from the facts placed before me that the first respondent opposed the application for summary judgment in the Johannesburg Magistrate's Court. She also filed an answering affidavit in the said application. Therefore, on that basis alone, it is clear that the first respondent was well aware of the summons issued in the District Court.

[39] Since the order was granted on 29 July 2020 the first respondent did not approach the Johannesburg District Court to rescind the said order granted against her. Although being aware of the court order, again she failed to take any further legal steps, which were available to her.

[40] Therefore, the second point *in limine* is dismissed.

Third point in limine

[41] The first respondent argued that the managing agent, PAL Property Management (“**PAL**”) is unknown to her and therefore she did not make any levy payments. She further contended that the bank account was not in the name of Pearlbrook Body Corporate and as such no levy payments were made.

[42] The applicant argued that the third point *in limine* should be dismissed because the applicant is a director of PAL and on his appointment as administrator of Pearlbrook Body Corporate he facilitated the administration of the Body Corporate through PAL. The applicant asserts that all statements were sent out to owners under the name of PAL.

[43] The applicant contended that the bank account was opened and is managed by PAL. He, as the administrator has full control over the bank account, and the bank account is administered in favour of the body corporate.

[44] Evident from the above, the first respondent acknowledges that she is in arrears of her levy payments. If indeed the first respondent had concerns relating to the management of the bank account, one would have expected her to effect payment of the monthly levy into a trust account held by an attorney. This was not done.

[45] I am of the view that the third point *in limine* stand to be dismissed.

Discussion

[46] Rule 46 of the Uniform Court Rule deals with execution against immovable property and the relevant provisions are quoted in below.

[47] Rule 46(1) provides as follows:

“(a) Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless-

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5).”

[48] Rule 46A, which came into operation on 22 December 2017, deals with execution against residential property which is the judgment debtor's primary residence. Rules 46A (1) and (2) are relevant and quoted in full below.

[49] Rule 46A (1) and (2) provides as follows:

“(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

(2)(a) A court considering an application under this rule must –

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.”

[50] What can be accepted from the provisions quoted above is that where execution is sought to be levied against the residential immovable property of a judgment debtor, a warrant of execution cannot be issued without judicial oversight and an order obtained from court permitting such execution.

[51] In deciding whether or not to order execution, a court is required to have regard to all relevant circumstances. Examples of such circumstances are; whether the rules

of court have been complied with; whether there are other reasonable ways in which the judgment debt can be paid; whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt; the circumstances in which the judgment debt was incurred; attempts made by the judgment debtor to pay off the debt; the financial position of the parties; the amount of the judgment debt; whether the judgment debtor is employed or has a source of income to pay off the debt; or any other factor as may be relevant to the particular case. These examples of relevant circumstances were confirmed by the Constitutional Court in the case of *Gudwana v Steko Development 2011 (3) SA 608 (CC)* at 626E.

[52] Counsel for the first respondent argued that the property is the primary residence of the first respondent and in declaring the property specially executable, the first respondent will be left homeless.

[53] When considering the argument raised in this regard, I cannot lose sight of the following facts;

1. On 29 January 2020 the Sheriff of Johannesburg Central execute a warrant at the said property, during the attempt the first respondent was not present at the property. Ms Sibongile Nyathi, a sub-tenant indicated that the first respondent was not residing at the property any longer, and
2. Prior to instituting these proceedings, the applicant enquired via the Columbus Profile Report System whether the first respondent occupies the property or not. On both the Columbus and CSI Person Trace profiles the first respondent's latest residential address was reflected as 102 Lang Street, Rosettenville, Johannesburg, which was updated on 31 December 2020.

[54] On the basis of the above facts, I am of the view that the property is not utilized by the first respondent as a primary residence.

[55] Be that as it may, even if the property is the primary residence of the first respondent, Rule 46A(2)(b) states;

*“A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor **unless** the court, having considered all relevant factors, considers that execution against such property is warranted.”* [my emphasis]

[56] In granting an order declaring the property in this matter specially executable, I take into consideration the following relevant factors, namely;

1. The application was brought before me as a consequence of a money judgment order granted by the Central District Court Johannesburg for the outstanding levies payable to the applicant.
2. The first respondent was unable to satisfy the judgment and a writ of execution was issued.
3. No movable property could be found to satisfy the judgment and a *nulla bona* return was issued.
4. Currently the outstanding amount is R 202 770. To date the first respondent has not made any attempt, either to reach a payment agreement with the Body Corporate or to settle the arrears. The last payment made by to the Body Corporate was in January 2014.
5. It is evident that the first respondent is well aware that levies ought to be paid by members belonging to the Pearlbrook Body Corporate. She does not dispute being in arrears. However, the first respondent argued that she did not receive levy statements, and therefore she was unable to make the necessary payments to the Body Corporate. No contention was made by the first respondent that she transferred the amounts owed to the Body Corporate into a saving or trust account in order to be paid over when issues between her and the Body Corporate are sorted.
6. A judgment was obtained in favour of the applicant against the first respondent for payment of arrear levies. The judgment was obtained on 29 July 2020 for the payment of R 128 407.79. No rescission application was instituted by the first

respondent following the order granted in July 2020 in the District Court. The order stands and must be executed.

7. This application was brought by the applicant in a further attempt to recover monies due and owing to it by the first respondent and, at very least, to avoid further prejudice being suffered by other members of the applicant having to carry the cost of the first respondent's ongoing failure to meet her monthly obligations to the body corporate.
8. Unpaid levies had continued to accrue after the granting of the summary judgment in the District Court. By the time this application was brought, the first respondent's arrear levy payments exceeded an amount of R 200 000. The applicant has a duty to protect and act in the best interests of its collective members and when one member fails to make her *pro rata* contribution to levies, it is to the detriment and prejudice of the applicant and its members.
9. There is no bond registered over the property. The municipal value of the property is R 182 000, rates and taxes outstanding is R 462.72. It is evident the property has no equity, because the amount of arrear levies far exceeds the municipal market value of the property. Therefore, to set a reserved price in this matter would be non sensical.

[57] In the circumstances and for all the reasons stated, I am of the view that the debt incurred places an untenable financial burden on the remaining members of the applicant. The first respondent is clearly not adhering to her financial responsibilities towards the applicant. The applicant has no other remedy other than requesting the court to declare the said property specially executable in order to recoup the amount in arrears.

[58] For completeness, I need to refer to the first respondent's argument that this court does not have jurisdiction to declare the property in this matter executable. This was based on the fact that the applicant elected to approach the Johannesburg Central

District Court in seeking summary judgment for the arrear levies. The first respondent therefore argued that the Johannesburg Central District Court will be the appropriate and correct forum to approach. The argument was only raised by the first respondent at the hearing, the issue was not mentioned in the papers.

[59] Even so, in the recent decision of *The Standard Bank of South Africa Limited and others v Thobejane and Others*¹, Sutherland AJA for the Supreme Court of Appeal in a strongly worded judgment held that the High Court must entertain matters within its territorial jurisdiction if brought before it although the magistrates' courts may have concurrent jurisdiction and that the High Court must respect an applicant's choice of forum. This clearly is dispositive of the first respondent's argument.

[60] He went further in *Thobejane*, and found that there was no obligation in law on financial institutions to consider the costs implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.

[61] In the circumstances, this court does have jurisdiction to entertain the application.

[62] However, the applicant was alive to what it effectively was seeking, was a form of process-in-aid.² The basis upon which the this court can enforce another court's order is by being satisfied that the requirements for granting process-in-aid have been satisfied. The applicant have made out a case for the relief that it seeks and a affidavit was filed in support of process-in-aid.

¹ The full citation is *The Standard of South Africa Limited and others v Thobejane and Others* [38/2019 and 47/2019] and *The Standard Bank of South Africa Limited v Gqirana N.O. and Another* [999/2019] [2021] ZASCA 92 (25 June 2021)

² Process-in-aid is a remedy by means whereby a court enforces a judgment of another court which cannot be effectively enforced through that court's own process and it is also a means whereby a court secures compliance with its own procedure. See *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC). It is a discretionary remedy that will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that other court which can be used. See *Bannatyne v Bannatyne* 2003 (2) SA 359 (SCA) at paragraph [22]. It is important to note that it is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court.

Costs

[63] The basic principles governing granting of cost ordered in civil litigation is that the judicial officer has the discretion in granting same, but that costs should generally follow the result.

[64] The most important principle is that where a party has been substantially successful in bring or defending a claim, that party is generally entitled to have a cost order made in favour against the other party who was not successful. I found no reason to deviate from the general rule pertaining to a cost order in this matter.

Order

[65] After having considered the papers filed of record, and having heard counsel for the parties, the following order is granted:

1. The immovable property (“the property”) described as:
Door number 22, Unit 10, Pearlbrook Complex, 30 Bruce Street, Hillbrow, Johannesburg (“the property”) registered under Title Deed ST41310/1999, is declared specially executable.
2. A writ of execution in respect of the property, as envisaged in terms of Uniform Rule 46(1)(a) is authorized.
3. The first respondent is ordered to pay the costs of this application.

DATE OF HEARING:

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
8 JUNE 2022**

JUDGMENT DELIVERED: 21 JUNE 2022

APPEARANCES:

Counsel for the Applicant:
Advocate N Nxumalo

Attorney for the Applicant:
H Gouws
SCHULER HEERSCHOP PIENAAR INC
011 -763- 3050/071 868 2163
hein@shplaw.co.za

Counsel for the First Respondent:
Advocate Lucky Mhlanga
Tel: 010 534 5821
Email: jhb@preciousmuleyaco.za
advmhlanga@gmail.com

Attorney for the First Respondent:
PRECIOUS MULEYA INC ATTORNEYS
151 Commissioner Street
Suite No. 512, Fifth Floor
Klamson Towers
Johannesburg
Tel: 010 534 5821
Email: jhb@preciousmuleyaco.za
advmhlanga@gmail.com