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

Case number: 2021/5838
Date of hearing: 8 August 2022
Date delivered: 18 August 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:
(2) OF INTEREST TO OTHERS JUDGES: YE4NO
(3) REVISED

DATE SIGNATURE

In the application between:

JAN VAN DEN BOS N.O. Applicant

and

MOGOANE MOHLAPELA JOHANNES First Respondent
MOGOANE MAKGWALE MAVIS Second Respondent
NEDBANK LTD Third Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Fourth Respondent

JUDGMENT

SWANEPOEL AJ:

[11 This is an application in terms of rule 46 (1) (a) of the Uniform Rules of Court, for an order declaring the first and second respondents' (referred to hereinafter as 'the respondents") immovable property situated at Door 44, Unit 24, Pearlbrook Complex, 30 Bruce Street, Hillbrow, Johannesburg ("the property") specially executable, and for an order that a writ of execution be issued in respect of the property.

[21 Applicant is the administrator of the Pearlbrook Body Corporation, appointed in terms of section 16 of the Sectional Titles Schemes Managing Act, Act 8 of 2011 ("STSMA"). First and second respondents are the registered owners of the property. Third respondent is the mortgage holder over the property. Third and fourth respondents are cited as interested parties, and no relief is sought against them. They have not opposed the application.

[31 It is common cause that first and second respondents are the owners of the property, and by virtue of their ownership, they are members of the body corporate. Applicant alleges that he may, from time to time, determine what levies are required to be paid by members Of the body corporate to cover the upkeep, control, management and administration of the property.

[41 Applicant alleges that respondents have fallen in arrears with their levies, and it is common cause that summary judgment has been granted against them in the Magistrate's Court, for payment of the sum of R 87 415.12 and costs. An attachment by the Sheriff of Court resulted in a nulla bona return. The debt remains unsatisfied, and as at January 2021

the arrear levies amounted to R 141 629.30. The last payment in respect of levies was made on 22 July 2015. Applicant now seeks relief from this Court in order to be allowed to sell the property in execution.

[51 Respondents' answering affidavit was filed out of time, and in the affidavit respondents seek condonation and put up a version regarding the cause of the delay. The issue of condonation was not argued before me, and, because of the view that I have taken on the application, I say no more on this aspect.

LOCUS STANDI

[61 Respondents have taken the point in limine that applicant does not have locus standi to launch this application. The main thrust of their argument originates from the order by which applicant was appointed as administrator. Section 16 of the STSMA requires an administrator to be appointed for a fixed period of time. Paragraph 1 of the order in terms of which applicant was appointed reads as follows:

> "Jan van 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")"

[71 The wording of the order is unfortunate. However, on a proper interpretation of the order as a whole, it is apparent

that applicant was properly appointed. This specific paragraph has been considered by Crutchfield J in Okafor v Jan van den Bos N.O. and Another. [1] She held as follows:

"Hence, purposively read and interpreted in its entirety, the court order demonstrates that the first respondent was appointed as the administrator in 2018 and thus had locus standi to launch the proceedings in the Magistrate's Court as well as the proceedings under case number 2020/28938 in this Court. "

[81 A similar approach was taken in Van den Bos N.O. v Sindane and another[2]. If I were to uphold respondents' point in limine, I would have to first find that both of the aforesaid judgements are plainly incorrect, which I cannot do. The point in limine must therefore fail.

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[1] Gauteng Division Johannesburg case no. 28938/2020 dated 4 July 2022

[2] Gauteng Division, Johannesburg case number 5837/2022 dated 21 June 2022

DISPUTE REGARDING THE ARREARS

[91 Respondents have denied the quantum of the arrears, although they have not denied that their levies are in arrears. Respondents allege that they have no knowledge of the managing agent, and that they have never received

proper invoices advising them what amounts were payable. Respondents' argument ignores the fact that there is a judgment against them, which has not been rescinded. In Bezuidenhout v Patensie Sitrus Beherend Bpk[3] the Court held that an order stands until set aside by a competent court of law. Therefore, until the judgment is rescinded, applicant is entitled to execute on it.

PROCESS-IN-AID

[101 As pointed out above, summary judgment was granted in the Magistrates' Court. Respondents argued that applicants now seek to enforce a judgment of another court, relief known as process-in-aid. As was pointed out in Bannantyne v Bannantyne and anotheH, process-inaid is a discretionary remedy. Although this Court has jurisdiction to hear the matter, the question to be considered is whether it should exercise its discretion to do so. Bannantyne makes it clear that process-in-in aid will not be granted if there are effective remedies in the court from which the order originated.

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[3] 2001 (2) SA 224 (E)
[4] [20021 ZACC 43

[1 11 In Bannantyne some reliance was placed on the following dictum in Troskie v Troskie[5] (in relation to the enforcement of a Magistrates' Court maintenance order:

> "It seems to me, therefore, that this Court, in the exercise of its discretion, should not entertain any application under rule 45 (12) (i) to enforce payment of the arrears of a maintenance order, unless there are good and sufficient circumstances warranting it. "

[12] In The Standard Bank of South Africa Ltd and others v Thobejane and others [6] the Supreme Court of Appeal held, in a firmly worded judgment, that a High Court cannot refuse to hear a matter in which the Magistrates' Court has concurrent jurisdiction. In Thobejane the Court was concerned with the question whether banks could commence proceedings in the High Court, in matters which fell within the jurisdiction of the Magistrates' Court. Thobejane is thus distinguishable on the facts. In the matters which Thobejane considered, the proceedings had been launched in the High Court from the outset. In the matter before me, the applicant had chosen to commence proceedings in the Magistrate's Court, and it is now seeking to enforce an order of that court.

[131 In Van den Bos N. O. v Mohloki and others [7] the facts were essentially identical to the facts in this matter. The Court explained that the question was not, in cases such as these, whether the High Court had

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[5] 1968 (3) SA (W)
[6] 2021 (6) SA 403 (SCA)
[7] 2020/1190

jurisdiction to entertain applications such as these, the question was whether, in circumstances where the applicant

had proceeded out of the Magistrates Court, and had obtained a judgment, the High Court should grant process-in-aid and enforce the order.

[141 The decision whether to come to applicant's assistance is a discretionary one, which should not be granted, in the words of Troskie,
"unless there are good and sufficient circumstances warranting it." Applicant has delivered an affidavit in which it explains the history of the matter. That affidavit stands uncontroverted by respondents. Briefly, applicant says that when the applicant launched these proceedings it was barred from doing so in the High Court, as the Registrar refused to issue any summons in which the monetary value fell within the jurisdiction of the Magistrate's Court. Where summonses were issued in such matters, the Registrar refused to grant judgment, simply referring the matters to the Magistrate's Court.

[151 Applicant's attorney says that once judgment was granted, the applicant ran into a brick wall in the enforcement of the judgment in the Magistrates' Court. In all applications to declare properties specially executable that the attorney has brought, the presiding officers have not considered the applications, but have invariably postponed the applications repeatedly, or have referred the matter to a section 65 hearing. Applicant's attorney says that this has occurred in all of the jurisdictions in which he has brought such applications, in various courts across the country. He has never been able to obtain a single order declaring a property specially executable, in any of his matters.

[161 It would be improper of me to find that this is a trend followed by all, or even most, magistrates. However, I accept, as the affidavit is not contradicted by respondents, that this is the experience of the attorney in various Magistrates' Courts.

[17] Section 34 of the Constitution reads:

> "34. Access to courts
>
> > Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. "

[181 Presiding officers are enjoined by section 34 of the Constitution to decide matters fairly. If matters are continuously postponed, and are not heard as expeditiously as possible, the presiding officer is not fulfilling his or her constitutional obligation to administer justice fairly. Magistrates take an oath in which they undertake to uphold and protect the Constitution, and to administer justice to all persons alike, without fear, favour or prejudice.

[191 If a matter is intentionally delayed due to a general belief that it is not in the interests of justice to grant such orders, the magistrate is not only breaching his/her constitutional obligation to determine the dispute, he/she is also not fulfilling the magisterial oath which requires a presiding officer to administer justice fairly to both parties in the dispute.

[201 In this case I cannot find that the trend which applicant's attorney alleges is a trend throughout the lower court system, and I do not do so. However, the affidavit provides, in my view, sufficient reason for applicant to have brought this application in the High Court.

PRIMARY HOME

[211 It is common cause that the property sought to be declared specially executable is respondent's primary home. Respondents say that if the order were to be granted, they would be left homeless.

[221 The following facts are relevant to the question whether it would be just to grant the order:

> [22.1] Respondents purchased the property at a purchase price of R 63 000.00 in 1996. A mortgage bond in favour of the mortgagor was registered over the property for the amount of R 40 000.00.
> The outstanding amount on the mortgage bond is R 19 268.69.
>
> [22.21 The municipal value of the property is R 204 000.00 and the expected value is R 290 000.00.
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> [22.31 The judgment was granted on 29 July 2020 at which time the arrears were R 87 415.12. The arrear levies escalated to R 141 629.30 as at January 2021. The last payment in respect of levies was received on 22 July 2015.
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> [22.41 R 29.67 is owed to the municipal authorities.

[231 Applicant's notice of motion explained to respondents that they had the right to deliver an affidavit in opposition to the founding affidavit.

The respondents' right to access to housing was also explained. Nevertheless, save for the statement that it would be prejudicial to respondents if the order were granted, and that they would be rendered homeless, I have not been told anything regarding the respondents' personal circumstances. I do not know whether they are employed, nor which persons, in addition to respondents themselves, reside in the property. I have not been told whether there is alternative accommodation available to respondents. I have not been told why respondents have not paid their levies for more than seven years.

[241 There has also been no attempt by respondents to secure a repayment plan. They maintain that they do not recognize the authority of the applicant to set levies, nor to pursue the payment thereof. I must take into consideration that the non-payment of levies is a problem that affects each resident of the sectional title development. Respondents have merely shifted their financial burden on to their neighbours.

[25] It is not a simple matter to declare an immovable property, which is a primary residence, specially executable. Respondents have, after all, resided in the property for some 26 years. However, in appropriate cases, a Court cannot shy away from the granting of the order. It is not only the interests of the respondents that should be considered, but also the interests of the creditor who is seeking to enforce a judgment. In my view, therefore, it would be appropriate to grant the relief sought.

RESERVE PRICE

[261 Applicant has argued for a reserve price of R 43 516.74. It has calculated this figure by deducting the arrear levies and the outstanding mortgage bond from the municipal value. I have calculated the average between the expected price of R 290 000.00 and the municipal value of R 204 000.00 as being R 247 000.00. From that figure I deduct approximately 30% to account for a forced sale. There are no municipal charges to speak of, and thus the reserve price shall be R 165 000.00.

[271 Consequently, I make the following order:

[27.11 The immovable property described as number 44, Unit 24, Pearlbrook Complex, 30 Bruce Street, Hillbrow, Johannesburg, registered under Title Deed ST 34185/1996 is declared specially executable.

[27.21 A writ of execution as envisaged by rule 46 (1) (a) shall be issued;

(27.31 The reserve price is set at R 165 000.00.

[27.41 First and second respondents shall pay the costs of the application jointly and severally.

Jc SWXNEPOEL

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

APPLICANT:	Ms. N Lombard
R	Schüler Heerschop Pienaar
	Mr. Ndlovu
OR	Precious Muleya Attorneys
	8 August 2022
MENT:	16 August 2022