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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED: No
22/05/2023

CASE NO:11192/2020

In the matter between

JAN VAN DEN BOS N.O. **Applicant**

(In his capacity as Administrator of Pearlbrook Body Corporate)

and

MALULEKE, LIZZY (NEE VAN WYK) **First Respondent**

MALULEKE, NKENSANI GLADYS **Second Respondent**

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY **Third Respondent**

Neutral Citation: *Jan Van Den Bos N.O v Maluleke Lizzy (Nee Van Wyk)* (Case No. 11192/2020) [2023] ZAGPJHC 546 (22 May 2023)

JUDGMENT

YACOOB J:

1. The applicant approaches this court on the strength of a judgment obtained against the first and second respondents in the Johannesburg Central Magistrates Court on 20 November 2019, for payment of a sum of R27 688,60 and interest, arising from unpaid levies. He seeks an order declaring the property which was the subject of the levies specially executable, together with a writ of execution. The execution of the judgment against the respondents' movables resulted in a *nulla bona* return.

2. The applicant is the administrator of the sectional title scheme, Pearlbrook, in which the property is situated. The first and second respondents are the joint owners of the property, a mother and daughter, and contend that the property is their primary residence. As the third respondent did not participate in these proceedings, where I refer to "the respondents", this means the first and second respondents.

3. The respondents raise the following points in opposition to the application:
   3.1. The applicant lacks *locus standi* to bring this application as his administratorship is not yet in force.
   3.2. The applicant should approach the Magistrate's Court for an order of special executability.
   3.3. The property is the respondents' primary residence, and would be rendered homeless and destitute by the forced sale of the property.

4. The first respondent states in her answering affidavit that she has been the registered owner with her daughter since her husband's death in 2009, while her husband had purchased it in 1996. She alleges that she has never been made aware of any arrears in levies. The applicant attaches in reply proof of service by hand of the notice of arrear levies.
5. The first respondent does not contend that she paid her levies. Instead she says that the affairs of the body Corporate were in disarray and there was no one to pay the levies to. The first respondent disputes the appointment of the applicant and contends that she has not paid levies to him simply because his appointment is still in dispute. There is no allegation that she is unable to pay levies or that levies were incorrectly levied.

6. The first respondent also alleges that she was not served with the summons of the magistrates court matter, and only became aware of it when the sheriff attempted to execute on the warrant on 3 March 2020.

7. However, since that date, the respondents have made no attempt to set aside the order of the magistrates court, either by way of rescission or appeal. That order therefore must stand and this court cannot interrogate the merits of the order.

8. The point *in limine* regarding the appointment and *locus standi* of the applicant has been raised and determined numerous times in this court. The applicant has provided to the court five separate judgments by five different judges of this court in which the same attorneys raised the same point *in limine* as a defence, each

time unsuccessfully. I am aware of at least many more, some anecdotal, and some which have come before more.

9. All five judgments which deal with the point *in limine* dismiss it on the basis that, although the order is not ideally worded, it is clear that the applicant's administratorship has commenced and is valid.
10. The respondents' counsel was unable to demonstrate that all these judges are wrong, nor do I see any reason to find that they were wrong. I do not devote any more time to the point *in limine* save to say that it clearly has no merit.

11. This means that the respondents' contention that they were not obliged to pay the applicant their levies must also have no merit. Of course it will always be open to the respondents to avoid the sale in execution by paying their outstanding levies to the applicant, now that they are aware that their objection has no merit.

12. The applicant accepts that it is asking this court for "process-in-aid" and that this is a discretionary remedy for which the applicant must make out a case. The applicant filed an additional affidavit by his attorney setting out what it contends is a proper case for this court to make a finding that the applicant is unable to obtain the relief it seeks in the magistrate's court. It is, essentially, that the magistrates systematically stonewall applications to declare a property specially executable, never making a decision one way or the other that could be appealed, but simply postponing or removing the matter from the roll on some pretext or another, including referring it to a section 65 enquiry, or requiring that section 65 be followed.

13. The applicant contends that the high court is more able to give the necessary judicial oversight on a decision such as this. I disagree. The magistrates court is perfectly able, and if it were not, it would not have the power.

14. The applicant's attorney also suggests that if the matters have to go to the magistrates court that will result in delays which will result in properties being hijacked.

15. The applicant's attorney does not annex any evidence to his affidavit of properties being hijacked because of what the magistrates court does, or any transcripts of the magistrates court proceedings in which magistrates just arbitrarily postpone or remove applications from the roll. Nor is there any evidence that of a matter that was referred for a section 65 enquiry arbitrarily.

16. The applicant's attorney refers to over 100 matters in which he has successfully obtained judgments declaring properties specially executable from this court where the monetary judgment was granted by the magistrates court.

17. I do not believe that reference to numbers necessarily makes out a case. Nor does the filing of a vague and generalized affidavit. It is not enough for an applicant to treat the application as a "box-ticking" exercise. The affidavit in support of process-in-aid must substantively make out a case one which the court can exercise its discretion in the applicant's favour. In my view it does not.

18. The applicant acknowledges, correctly, that this is not a question of jurisdiction as that in *Standard Bank of South Africa Limited and Others v Mpongo and Others*.[1]

[1] 2021 (6) SA 403 (SCA)

The principles in *Mpongo* would apply were the applicant approaching this court from the beginning. This is a question of whether process-in-aid is appropriate.

19. One of the judgments referred to by the applicant was *Jan van den Bos NO v Mogoane and Others*[2] in which Swanepoel AJ accepted the explanation provided in a so-called "process-in-aid affidavit" and granted the order. The learned judge relied on section 34 of the Constitution to find that the practice in the magistrates courts described by the applicant's attorney resulted in a deprivation of effective access to courts.

20. I do not know what exactly was before the court in the *Mogoane* matter. I can only decide on what is before me, and whether it is sufficient to enable to exercise my discretion in the applicant's favour. In this particular matter, it is not.

21. For these reasons, the application is dismissed with costs.

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S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	N Lombard
Instructed by:	Schuler Heerschop Pienaar Attorneys
Counsel for the first and second respondents:	D Ndlovu
Instructed by:	Precious Muleya Attorneys
Date of hearing:	08 November 2022

[2] 2022 JDR 2404 (GJ)

Date of judgment: 22 May 2023