

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case No. 55013/2020

1. REPORTABLE: NO
2. OF INTEREST TO OTHERS JUDGES: NO
3. REVISED: 5/9/2023

7 September 2023

SIGNATURE

DATE

In the matter between:

THE BODY CORPORATE RUBY COURT

Applicant

And

BHEKINKOSI ISAAC BOYCE

Respondent

JUDGMENT

YENDE AJ

Introduction

[1] This is an opposed application to declare the respondent's immovable property specially executable with the Reserve price of R500,000,00.

Factual matrix

[2] The respondent is the owner of an immovable property being a Flat [..] of the Sectional Title Scheme SS RUBY COURT, Scheme Number [..], situated at [..] Silver Bell Street, Eco Park, Highveld Ext 51, in the extent,82 square metres, held under Deed of Transfer No, ST7 [..] ('the Property').¹ There is a bond registered in favour of Standard Bank LTD over the property in the amount of R648 000.00.

[3] By virtue of owning the said immovable property within the Sectional Title Scheme SS Ruby Court, the respondent is liable to make contributions towards the applicant who is **THE BODY CORPORATE RUBY COURT**, a Body Corporate duly registered by the Registrar of Deeds, Pretoria, in terms of section 36 of the Sectional Titles Act (Act 95 of 1986 under the Scheme Number [...]) and with its chosen *Domicilium citandi et executandi* at Pretoria le Roux Inc, Hilda Chambers, [.....] Pretoria.

[4] In terms of a resolution taken by the members of the applicant each year at a General meeting, the respondent is liable for levies payable in respect of the unit in terms of the said Act, which amount is payable to the applicant on the 1st day of _____

¹ Deed Search, Annexure "A1" and "A2" to the founding Affidavit , A21to A22

every month, in advance, as well as interest on the arrear levies at the rate determined from time to time by the trustees of the applicant in terms of Section 37(2) of the Sectional Title Act, 95 of 1986.

[5] As a result of the respondent's failure to make regular monthly payments towards the above mentioned levies, contributions, and charges, and after demanding such payments from the respondent, the applicant issued summons against the respondent .

[6] Summons under the above-mentioned case number was issued and served on the respondent at his *Domicilium* address. The return of service states that the summons was served on 26th October 2020 by affixing same to the principal door. The tenant, Mrs N Xulu, did not want to accept the service and upon various attempts by the sheriff to contact the respondent was unsuccessful.

[7] In terms of Section 4(5) of the Sectional Title Schemes Management Act, 2011 (Act no 8 of 2011), the *Domicilium citandi et executandi* of each owner shall be the address of the section registered in his/her name and the owner is entitled to change his/her said address within written notice to the Body Corporate and no such notification was received from the respondent .

[8] The respondent failed to enter appearance to defend the action despite proper service of the summons. The applicant obtain default judgment against the

respondent on or about 1 June 2021 for the amount of R 40 651.01 (Forty Thousand Six Hundred and Fifty- One Rand and One Cent). The amount has increased to R 73 838.17 (Seventy- Three Thousand Eight Hundred and Thirty- Eight Rand and Seventeen Cents) during November 2021 and has currently increased to a R111 775. 95 (One Hundred and Eleven Thousand Seven Hundred and Seventy - Five Rand and Ninety- Five Cents).

[9] A Warrant of Execution was then issued against the movable property of the respondent and same was served at the *Domicilium* address of the respondent. The Sheriff of the Court on the 8th of July 2021 found the respondent at the Unit. The respondent indicated to the Sheriff that he does not own movable or immovable property and the Sheriff could not make an attachment as the goods in the unit were not sufficient to satisfy the Warrant.

[10] The Sheriff provided a *Nulla Bona* Return, and the respondent signed the original Warrant. The respondent arranged in October 2020 to make payments of R 3000.00 per month over and above the normal monthly levy and the arrangement was accepted by the applicant. However, the respondent did not make payment as agreed with the applicant on the 18th December 2020. The applicant then advised the respondent that due to his failure to comply with his own payment arrangement it will proceed with the legal action and the respondent agreed.

[11] The applicant now seeks an order declaring the respondent's immovable property specially executable.

[12] It has been positively proven that the respondent is, however, the owner of another immovable property being Unit 134 in the Section Title Scheme SS Woodpecker, Schem No[....], held under Deed of Transfer ST [...]².

[13] The applicant contends that the respondent immovable property be specially executable, and a reserve price of R 500 000.00 be set by the court.

[14] The respondent fell into arrears with the applicant Body Corporate levies due to his divorce from his wife and his financial position was constrained and affected by the Covid 19 pandemic. The respondent avers that he attempted to expunge his arrears but due to the economic climate he was unable to do so.

[15] The respondent contends that his immovable property should not be declared specially executable instead he must be given a 6 (six) months reprieve because of the fact that he hold a BCom Accounting degree and an MBA from Wits University and that he is a final semester law student who is left with 2 months to finish his studies and has already secured tentative position as a candidate legal practitioner.³

[16] The respondent conceded that the immovable property in question is not his primary residence as he has put a tenant there to help him to raise money to pay for his mortgage loan. He further averred that the rent money he receives from the same

² Deed Search, Annexure "A1" and "A2" to the founding Affidavit , A21to A22

³ See Caselines paginated pgs. G2.

property is not enough to cover both the mortgage bond as well as the Body Corporate levies .

[17] The respondent prays that the Court should grant him an additional 8 to 12 months to pay the outstanding levy fees whilst also paying the current levies.

[18] The transactional history of the respondent's levies account reveals that⁴, since the 1 September 2019 to 1 October 2022 the respondent has only made one payment of R5 000.00 on 27 August 2022. The arrears as on 1 October 2022 amounted to R 114791.54. There is no averments by the respondent that he approached a debt counsellor in order to have his debt restructured in terms of Section 86 of the National Credit Act .

[19] On 10 May 2022 the respondent wrote an email to Andre Potgieter wherein the respondent proposed that he be allowed to do a private sale of the Ruby Court property so that he can raise enough cash to cover the arrears amount⁵. This is self-evident of the fact that the respondent did not consider the said property to be his primary residence since he had an alternate accommodation ⁶.

[20] On 24 August 2022 the respondent wrote an email to Andre Potgieter wherein he sought to clarify his settlements agreement with the applicant to the effect that he

⁴ See Caselines paginated pgs. A125 -A129

⁵ See Caselines paginated pgs. A 123.

⁶ See foot note 2 supra.

had proposed to pay an amount of R 10 000.00 by 20th August then R 5000.00 every Month-end thereafter. Then following month R10 000 for the other account and R5000 thereafter. It is also evident from the transitional history of the respondent's account that he only paid R 5000.00 on 27 August 2022 and then reneged on his settlement arrangements .

Analysis

Service of Summons

[21] The summons was duly served on 26 October 2020 on the respondent at the respondent's chosen *domicilium* address by affixing same to the principal door. The tenant, Mrs N Xulu, did not want to accept the service and upon various attempts by the sheriff to contact the respondent was unsuccessful.

[22] In terms of Section 4(5) of the Sectional Title Schemes Management Act, 2011 (Act no 8 of 2011), the *Domicilium citandi et executandi* of each owner shall be the address of the section registered in his/her name and the owner is entitled to change his/her said address with a written notice to the Body Corporate and no such notification was received from the respondent .

[23] It is submitted on behalf of the applicant that Section 65 procedures of the Magistrates Court Act is not an adequate remedy for the applicant due to the following⁷;

⁷ See Caselines paginated pgs. A16.

a. The respondent has three judgments listed against his name as illustrated by a Windeed TransUnion Consumer Profile Search attached hereto marked Annexure “11”;

b The respondent already confirmed that he cannot keep to an arrangement, and he signed a Nulla Bona Return with the Sheriff, attached hereto marked a Annexures “E1” and “E2”;

c Section 65 remedy has been exhausted and proven futile further prejudicing the applicant in making and further attempts as the levies increases monthly;

d Thus,...

e The debt is also accumulating monthly and the respondent is financially unable to keep up with the normal levies including extinguishing the arrears.

Respondent’s Current Default.

[24] The arrears as on 1 October 2022 amounted to R 114791.54 and still escalating. The applicant obtained the arrears amounts owed to the City of Tshwane with regards to the immovable property indicating that the outstanding rates and taxes amounts to R 17 353.89 up to and including July 2021 no updated figures were provided to the Court at the hearing of the matter.

Potential Prejudice for applicant and respondent .

[25] Applicant submitted that it has a duty to protect and act in its member's best interests in the maintenance and up-keep of the applicant Body Corporate, that it is to the detriment and prejudice of the applicant and its members when one member fails to make his/her pro-rata contribution to the levies, contributions and charges.

[26] In the event the order sought to specifically execute against the respondent's immovable property is granted, the prejudice current suffered by the applicant will be mitigated and the respondent current increasing levies and outstanding arrears will be mitigated significantly if the property could potentially be sold for an amount in excess of the total outstanding arrear amounts due to the applicant.

[27] The applicant avers that declaring the respondent's immovable property executable is the only viable option to extinguish the judgment debt of the respondent and that there exist no other alternatives, but to declare the property specially executable.

Legal framework

[28] As adumbrated supra, the respondent is the owner of two immovable properties, by his own admission the property in question is use as a rent-income generating

property. The rentals received from the very same property are used, contends the respondent to service his Standard bank home loan and as a result he is not paying for the levies due to the applicant.

[29] The fact that the property in question is rented out by the respondent as mentioned *supra*, it cannot be said to be his primary residence. Accordingly, from the uncontested facts mentioned *supra* the respondent is residing with his brother at Unit 134 in the Section Title Scheme SS Woodpecker, Schem No[...], held under Deed of Transfer ST [...] ⁸.

[30] The court is mindful of the application of Rule 46 of the Uniform Rules of Court which states *inter alia* that :

“(1) (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 specifically executable by the court or where judgment is granted by the registrar under rule 31(5).

⁸ See foot note 6 *supra*

[31] In the matter of *Nkola v Argent Steel Group (Pty) Ltd*⁹ it was held that common law and the Uniform Rules of Court allow a judgment to levy execution against the immovable property of a judgment debtor if the latter claims of movables to satisfy the judgment debt but fails to point them out and make them available.

[32] It follows that despite a creditor having unsuccessfully attempted execution against a debtor's movable property, the immovable property of a debtor should only be declared specially executable if the court has considered all the relevant factors and it is satisfied that good cause exist for declaring the immovable property specially executable¹⁰.

[33] It also warrants to observe the considerations of Rule 46A of the Uniform Rules of Court when faced with the application of this nature. Rule 46A of the Uniform Rules of Court *inter alia* states the following:

(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

⁹ 2019 (2) SA 216 (SCA) at 2188 to 2208.

¹⁰ *Id*

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.

[34] As adumbrated *supra* the immovable property in question is not a primary residence of the respondent, however the applicant has submitted that a reserve price in the amount of R 500 000.00 can be set by this court.

[35] According to the valuation sought by the applicant¹¹, the estimated market value of the immovable property is R 740,000,00. The Municipal Valuation of the property is R 590,000.00. There is a mortgage bond registered over the property in favour of Standard Bank in the amount of R 648,000.00. The respondent is in arrears with his City of Tshwane Municipal account in the amount of R 17,353,89 as at July 2021.

[36] The proposed amount of R 500,000.00 to be set as a reserve price I consider to be fair and reasonable in the *in casu*.

[37] Consequently, I make the following order:

Order

[38] That the property owned by the respondent and more fully herein under described is specially and immediately executable subject to a Reserve Price of R 500,000.00 namely;

¹¹ See caselines paginated pgs. A68 annexure “j” to the founding affidavit.

a Flat [...] of the Sectional Title Scheme SS RUBY COURT, Scheme Number [...], situated at [...] Silver Bell Street, Eco Park, Highveld Ext 51, in the extent, 82 square metres, held under Deed of Transfer No, ST7 [...] ('the Property'),

[39] That the respondent is liable to pay the legal costs incurred by the applicant/plaintiff in obtaining the recovery of arrear levies in terms of Rule 25(4) of the Sectional Titles Schemes Management Act, 2011 (Act No 8 of 2011), on Attorney and Client scale in terms of Rule 31(5) of Annexure 8 to the Sectional Title Act 95 of 1986, the rules and regulations of the Body Corporate, alternatively a resolution.

J YENDE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 7 September 2023

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Respondent:

**In person
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Date heard:

31 May 2023

Date of Judgment:

7 September 2023