IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 2635/2010
Date heard: 7 December 2010
Date delivered: 17 December 2010

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

CHRISTIAAN SIEBERT First Defendant

MARIA MARGARET SIEBERT Second Defendant

AND

Case No.: 2219/2010

In the matter between:

FIRSTRAND BANK LIMITED Plaintiff

and

WAYNE LEIGHTON NEL First Defendant

MAURITTA NEL Second Defendant

JUDGMENT ON APPLICATION FOR SUMMARY JUDGMENT

DAMBUZA, J:

1]On 2 August 2010 Rule of Practice 14A of the Joint Rules of Practice for the High Court in the Eastern Cape Province came into effect. This Rule of Practice provides that:

> "a) In all applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, the creditor shall aver in an affidavit filed simultaneously with the application for default judgment:
>
> i) The amount of the arrears outstanding as at the date of the application for default judgment.
> ii) Whether the immovable property which it is sought to have declared executable was acquired by means of or with the assistance of a State subsidy.
> iii) Whether, to the knowledge of the creditor, the immovable property is occupied or not.
> iv) Whether the immovable property is utilised for residential purposes or commercial purposes.
> v) Whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.
>
> b) All applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, where the amount claimed falls within the jurisdiction of the magistrate's court, shall be referred by the Registrar for consideration by the Court in terms of Rule 31(5)(b)(vi).
>
> c) A warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of Rule 31(5)(d)."

2]This Rule of Practice follows a similar Rule of Practice in the South Gauteng

High Court. Both Rules, it would appear, are founded on a number of Court judgments on the impact of section 26 of the Constitution of South Africa Act, Act 108 of 1996 ("the Constitution") regarding the procedure for obtaining default judgment and executing in pursuance thereof, on immovable property owned by a judgment debtor where such immovable property has been hypothecated in favour of the judgment creditor.[1]

3]The judgments include: **Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others** 2005 (2) SA 140 (CC); **Nedbank Ltd v Mortinson** 2005 (6) SA 462 (W); **Standard Bank of South Africa Ltd v Saunderson and Others** 2006 (2) SA 264 (SCA) and **ABSA Bank Ltd v Ntsane and Another** 2007 (3) SA 554 (T).

4]In **Jaftha** *(supra)* the Constitutional Court declared unconstitutional and invalid section 66(1)(a) of the Magistrate's Court Act 32 of 1944, for failure to provide judicial oversight over sales in execution against immovable property of judgment debtors.[2] To remedy the defect, the Constitutional Court ordered that this section be read as though the words *"a Court, after consideration of all relevant circumstances may order execution"* appeared in the section

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1 Execution Against Immovable Property: Negotiating the Tightrope of s 26; Christo Smith and SJ Van Niekerk).

2 The section provides that:

> "Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made."

before the words *"against the immovable property of the party"*; the consequence being that a warrant of attachment of immovable property on receipt of a *nulla bona* return in respect of the movable property, could only be issued by a Court after consideration of all relevant circumstances. The practical effect of the judgment is that the process of obtaining a judgment and execution against a judgment debtor's movable property remains the same. However once a sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt the creditor will need to approach a court to seek an order permitting execution against the debtor's immovable property.[3]

5]In **Mortinson** *(supra)* the Full Court of the WLD (as it then was), held, per Joffe J, that where a debtor had specifically hypothecated his or her immovable property and there was no abuse of court procedure, the limitation on the debtor's right in terms of section 26 of the Constitution was reasonable and justifiable as contemplated in section 36(1) of the Constitution (and that the Registrar was therefore permitted to grant an order declaring specially hypothecated property executable in terms of Rule 31(5) of the Rules of Court).[4]

6]In **Saunderson** *(supra)* the Supreme Court of Appeal held that, the essence of the judgment **Jaftha** was that a warrant of execution that would deprive a person of *"adequate"* housing would compromise his or her rights under

3 See Jones & Buckle: The Civil Practice of the Magistrate's Courts in South Africa, Vol 1, 9th Edition.

4 It is in this context and to assist the Registrar in determining whether there was abuse of procedure and whether a particular matter should be referred to open Court for consideration that the practice directive was issued in the South Gauteng High Court).

section 26(1) of the Constitutions and would therefore need to be justified as contemplated in s 36(1) of the Constitution. The Court distinguished **Jaftha's** case in that in **Jaftha**, what was in issue was not section 26(3) of the Constitution[5] but section 26(1) thereof[6] and, until the judgment debtor could show infringement of section 26(1) of the Constitution the bank was not called upon to justify the grant of the orders declaring the defendants' hypothecated property specifically executable. The Court, in **Jaftha**, so it was held, did not decide that Section 26(1) was compromised in every case where execution was levied against residential property. Further, in **Jaftha** the judgment creditor had not been a mortgagee, with rights over the property that derived from an agreement with the owner. The Court held further that the effect of the registration of a mortgage bond, is that the borrower, by his or her will, compromises his or her rights of ownership until the debt is repaid. His or her rights of ownership and occupation depend on repayment, and the bond curtails his/her rights to property as the bondholder's rights are fused into the title itself.

7]In **Ntsane** *(supra)* Bertelsmann J considered an application for default judgment and for immovable property used as the defendants' home to be declared executable where the defendants were in arrears of R18,46 with their repayments of a mortgage bond. The Learned Judge held, amongst others that the plaintiff's right to enforce lawful agreements had to be

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5 Section 26(3) of the Constitution provides that:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

6 Section 26(1) of the Constitution provides that:

> "Everyone has the right to have access to adequate housing."

balanced against the defendant's constitutional right to adequate housing, and that the proportionality of the harm that each party would suffer should be weighed up against each other by taking the value of the bonded property, the past history of payments made by the debtor; the amount outstanding on the bond; any assets the debtor might possess other than the immovable property, particularly movable assets capable of easy attachment and sale in execution; any other debts of which the bondholder was aware, such as arrear rates and municipal taxes and whether the debtor was or was not employed. The Court held that a Court should inquire from a bondholder why a small sum that is in arrears on a bond over a moderate property could not be collected by execution against movable assets. The principle laid down in **Ntsane's** case has been summarized as follows:[7]

> "…whenever a bondholder calls up the bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at date of application for (default) judgment is so small that it should really be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of immovable property as executable would constitute an abuse of the process of the court and an infringement of the debtor's fundamental right to adequate housing in terms of s 26 of the Constitution of the Republic of South Africa, 1996. Consequently, judgment to declare the immovable property executable should be refused unless and until the plaintiff has persuaded the court by means of acceptable evidence that no other reasonable alternative exists to enforce its right."

8]It was in this context that I invited counsel in the matters under consideration to make submissions on why the provisions of Rule of Practice 14A should not apply in applications for Summary Judgment. What was of

7 Jones & Buckle *(supra).*

particular concern to me was the absence in the preceding summons and applications seeking to have the defendants' hypothecated properties declared executable, of the amount of arrears. In both applications the defendants had only filed appearances to defend. No affidavit had been filed setting out their defence. My concern was that I would not be able, on what was before me, to determine whether there was (no) abuse of the court procedure and whether it was proper, in the circumstances, to declare executable the hypothecated property.

9]In both applications before me allegations are made in the summons, of a loan by the plaintiff to the defendant and a related Mortgage Bond registered over the property sought to be declared executable. The plaintiff pleads in the Summons that the, *"… amount (the loan amount and the amount additional thereto in terms of the mortgage bond) is now payable… by reason of the failure of the defendants within ten days from delivery to the Defendants of written notice from the Plaintiff to do so to pay an amount or amounts due by the Defendants in terms of the Agreement …"*. A further allegation in the summons is that *"the defendants are in default under the credit agreement that is being reviewed in terms of section 86 of the Act (the debt review) and the plaintiff has given notice … to terminate the review…".*

10]Counsel appearing for the plaintiffs in both matters submitted that applications for summary judgment are distinguishable from default judgment applications in that in summary judgment applications the defendant, who is, in most cases legally represented, places his or her defence(s) on record.

Consequently, so it was argued, if the defendant sought to advance, as a defence, abuse of Court procedure or impropriety of execution on the immovable property, they would have set out such a defence in opposition to the application for summary judgment. The provisions of Court Rule 14A should therefore not be applicable in applications for summary judgments, where infringement of section 26(1) of the Constitution is not advanced by a defendant who opposes summary judgment, so it was argued. The court should grant judgment, including an order declaring the hypothecated property executable, without further ado. In this regard reliance was placed on the **Mortinson** and the **Saunderson** decisions. It was specifically submitted that it was incumbent upon a defendant, where he/she considered his rights under section 26(1) of the Constitution to have been infringed (or under threat) or where he/she thought there was abuse of Court process to expressly plead such infringement.

11]Although I agree with the distinction between applications for summary judgment and default judgments, I do not think that is the end of the matter. My view is that whilst the principle emanating from the decisions referred to above is that there is no duty on a plaintiff who seeks execution of a specifically hypothecated immovable property to prove non-infringement of the debtors rights under section 26 of the Constitution, an equally relevant principle that emanates from the decisions is that there is a duty on the Courts, when considering applications to declare hypothecated immovable property executable, to guard against abuse of the court process. Such duty does not, in my view, cease with the filing of an appearance to defend or even

the filing of an affidavit in opposition to an application for summary judgment. This is particularly so where, as in the cases before me, the amount of arrears does not appear in the summons. In this context a clause in the summons calling upon the defendants to place before Court information supporting a claim of infringement of section 26(1) of the Constitution, if any, is of no assistance to a court in the exercise of its discretion as to whether to declare the properties in question executable. The duty of the Court to take into account all the relevant circumstances, and to determine whether there is no abuse of Court procedure, can only be properly discharged where all relevant factors are placed before the court. Where a plaintiff, relies on a defendant's failure to make repayments, it seems to me that it is incumbent upon the plaintiff to set out clearly facts or circumstances from which the court can make a determination as to whether there is abuse of court process or not. Such a requirement is not, in my view, in conflict with the decisions in **Mortinson** and **Saunderson** because the relevant determination can, for example, be made by simply considering the amount of arrears and the period for which the arrears have been outstanding. In **Ntsane** *(supra)* Bertelsmann J held that: [8]

> "… the Court could and should inquire from the bondholder why a small sum that is in arrears on a bond over a moderate property could not be collected by execution against movable assets. Even if the bond provides for acceleration of the bond upon non-payment, the Court is entitled to refuse to grant execution against immovable property where the result is so seemingly iniquitous or unfair to the house owner that the enforcement of the full rights to execution would amount to an abuse of the system"

8 At paragraph 79.

12]In **Ntsane** Bertelsmann J referred to the plaintiff's decision to enforce the bond amount of arrears as *"morally and ethically questionable and strongly reminiscent of Shylock insisting upon every single ounce of his pound of flesh"*. I agree.

13]In his written heads of argument, *Mr Scott* who appeared for the plaintiff against Siebert referred, correctly in my view, to principles emanating from **Jaftha** *(supra)*[9] as follows:

> "5.3.1 It is difficult to see how the collection of trifling debts can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated.
> 5.3.2 The interests of creditors (which) must not be overlooked.
> 5.3.3 If there are other reasonable ways in which a debt can be paid an order permitting a sale in execution will ordinarily be undesirable. However, if the requirements of the rules of court have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate unless the ordering of that sale in the circumstances of the case would be grossly disproportionate.
> 5.3.4 The size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her right to adequate housing where the debt involved is trifling in amount and significance to the judgment creditor…"

14]These are the guidelines that in these cases I am not able to properly apply because of the absence of allegations as to the extent of the defendants' default.

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9 At pages 5 and 6.

15]I agree with the submission on behalf of the applicants that the number and content of affidavit(s) in support of a summary judgment is limited, and that verification of the cause of action is generally done by simply referring to the facts alleged in the summons; it is generally unnecessary to repeat all the particulars.[10] But on the principles set out above, where non-payment of instalments is the cause of action, and the amount of arrears is not apparent from the summons no proper case has been made for an order declaring executable an immovable property specifically hypothecated.

16]It has been held that the discretion conferred on the Court by Rule 32(5) should not be exercised on the basis of mere conjecture or speculation; it should be exercised on the basis of the material before the Court.[11] Where such material is lacking in material respects there can be no proper exercise of discretion.

17]I am satisfied, however, that, based on the allegation of default by the defendants, the plaintiff is entitled to judgment in its favour, for the amount due under the loan agreement.

18]Consequently the following orders shall issue:

18.1 **Case No.: 2635/2010**

10 Rule 32(4) of the Uniform Rules of Court provides that no evidence may be adduced by the plaintiff other than the affidavit referred to in sub-rule (2). Sub-rule 2 limits the content of the plaintiff's/creditor's affidavit to facts verifying the cause of action and the amount claimed if any and stating that in his (her) opinion there is no *bona fide* defence to the action and that the notice of intention to defend has been delivere3d solely for the purpose of delay.

11 **Vitamax (Pty) Ltd v Executive Catering Equipment CC and Others** 1993 (2) SA 556 (W).

(a) Payment of the amount of R850,106.82;

(b) Payment of interest on the said amount of R850,106.82, calculated and compounded monthly, at the rate of 9.6% per annum with effect from 31 July 2010 to the date of payment, both dates inclusive;

(c) Costs of suit to be taxed.

18.2**Case No.: 2219/2010**

(a) Payment of the amount of R69,951.96;

(b) Payment of interest on the said amount of R69,951.96, calculated and compounded monthly, at the rate of 12.5% per annum with effect from 20 June 2010 to the date of payment, both dates inclusive;

(c) Costs of suit as between Attorney and Client to be taxed.

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N. DAMBUZA
JUDGE OF THE HIGH COURT

Case No.: 2635/2010

Appearances:

For the plaintiff: Adv P.W.A. Scott SC instructed by Spilkins Attorneys of Port Elizabeth

For the defendants: No appearance – unopposed

Case No.: 2219/2010

Appearances:

For the plaintiff: Adv. N. Mullins instructed by Spilkins Attorneys of Port Elizabeth

For the defendants: No appearance – unopposed