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

Case Number: 39791/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

27.08.23

In the matter between:

ABSA BANK LIMITED

Applicant

and

BUTINYANA LOVEDAY MALATJI

Respondent

JUDGMENT

FORD, AJ

Introduction

- [1] The applicant seeks an order declaring the immovable property described as PORTION 155 of ERF [...] Krugersdorp Extension 2 Township, Registration Division I.Q. The Province of Gauteng, Measuring 257 (two hundred and fifty-seven) square metres, held under Deed of Transfer No: T44784/2011, specially executable.

- [2] The respondent opposes the application, albeit that he failed to attend the hearing of this matter on 24 April 2023.

The facts

- [3] The respondent breached the terms of the mortgage loan agreement concluded between himself and the applicant. Pursuant thereto, and on 13 April 2017, the applicant obtained a money judgment against the respondent.
- [4] The property is the respondent's primary residence.
- [5] At the time of instituting the application, the provisions of Rule 46A were not as yet applicable.
- [6] The applicant filed its founding papers in May 2017. The respondent filed his answering affidavit on 18 July 2017. In its replying affidavit, filed on 12 October 2021, the applicant dealt with the requirements of Rule 46A.
- [7] Rule 46A came into operation on 22 December 2017, and applies to pending proceedings, including the present.
- [8] This matter has a protracted history:
- 8.1. At the time summons was issued (November 2016), the arrears in respect of the mortgage loan was R106 010.74;
- 8.2. The money judgment was granted on 13 April 2017;
- 8.3. In May 2017, the respondent's arrears were R143 080.89;
- 8.4. As at May 2021, the respondent's arrears accumulated to R616 541.40;
- 8.5. From March 2015 to March 2021, only 12 payments were made by the

respondent.

- [9] The total amount due to the applicant stands at R1 060 545.75.
- [10] The respondent does not deny his indebtedness to the applicant; nor that he has defaulted on and breached the loan agreement. Instead, the respondent sought an indulgence from the applicant to be granted more time to sell the property and defray his debt to the applicant.
- [11] The answering affidavit was filed in 2017, and effectively the respondent had 5 years within which to dispose of the property.

Analysis

- [12] Rule 46A applies in circumstances where the immovable property in question is the primary residence of the judgment debtor. Rule 46A(2)(b) provides that *“a court shall not”* grant a special executability order in respect of a judgment debtor’s primary residence *“unless the court, having considered all relevant factors, considers that execution against such property is warranted”*.
- [13] Particularly relevant in the current circumstances is Rule 46A(2)(a)(ii), which requires that a court considering an application for a special executability order *“must ... consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence”*.
- [14] The respondent was provided with an opportunity to place such facts before the court, pointing to alternative means by which he could satisfy the debt. That opportunity was spurned.
- [15] In *Standard Bank of South Africa Limited v Hendricks and Another and various other matters*¹, the court, having regard to the provisions of Rule

¹ [2018] ZAWCHC 175 (14 December 2018); [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC)

46A(8)(e)² expressed the view that only in 'exceptional circumstances' should a court seized of an application under the rule not exercise its discretion to set a reserve price.

[16] Rule 46A(9)(b) provides, to the extent that the court decides to set a reserve price, it shall take into account:

- 16.1. the market value of the immovable property;
- 16.2. the amounts owing as rates or levies;
- 16.3. the amounts owing on registered mortgage bonds;
- 16.4. any equity which may be realised between the reserve price and the market value of the property;
- 16.5. reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);
- 16.6. whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;
- 16.7. the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;
- 16.8. any prejudice which any party may suffer if the reserve price is not achieved; and
- 16.9. any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

[17] The property was valued by Mr. Van Eeden and deemed to have a market value of R850 000.00. The property value in terms of the municipal account is R800 000.00

[18] The debt due to the applicant is R1 060 545.75. And as at March 2021, the property had outstanding municipal charges of R15 126.51 and levies of

² The subrule empowers a court granting such an order declaring a property specially executable, to determine a reserve price for the sale in execution.

R39 232.39, plus legal costs to the body corporate in the amount of R14 002.04.

[19] The market value of the property, less the municipal rates, less levies and legal costs round off to an amount of R781 639.06 less 30% which equals a forced value of R547 147.34.

[20] In the result, I make the following order:

Order

1. The immovable property described as PORTION 155 of ERF [...] Krugersdorp Extension 2 Township, Registration Division I.Q. The Province of Gauteng, Measuring 257 (two hundred and fifty-seven) square metres, held under Deed of Transfer No: T44784/2011, is declared specially executable as provided for in terms of Rule 46A of the Rules of this court, for the sum of R669 060.78 plus interest at 10,55% per annum capitalised monthly from 10 September 2016 to date of payment.
2. The property, described above, shall be sold in execution at an initial reserve price of R547 147.34.
3. If the initial reserved price is not achieved, the applicant may approach this court on the same papers, duly amplified for a reduced reserve price.
4. The respondent is ordered to pay the costs of this application on the ordinary scale.
5. The applicant is ordered to advise the respondent in writing (by way of personal service) of the scheduled date and time of the sale of execution.
6. The sale in execution may be set aside, in the event that the respondent settles what is owed to the applicant in full, prior to the date of the sale in execution.

B. FORD

Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 27 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 27 August 2023

Date of hearing: 24 April 2023

Date of judgment: 27 August 2023

Appearances:

For the applicant: Adv. H. Van Der Vyver
Instructed by: Tim Du Toit & Company Inc

For the respondent: No appearance