IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case no. 14498/11

IN THE MATTER BETWEEN 13/6/2012

ABSA BANK LIMITED Applicant/Plaintiff

(Reg. no: 1986/04794/06)

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2012/06/13 DATE SIGNATURE

MATSHEDISO MILLICENT SETAI
Respondent/Defendant

JUDGMENT

LEGODI J

[1] This matter was laid before me in the unopposed motion roll on the 4 June 2012 when it was stood down for further argument on Friday the 8 June 2012.

[2] In the notice of motion, the plaintiff asks for relief as follows:

"1. *The Registrar of the above Honourable court be directed to issue a Warrant of Attachment against:*

ERF	*PORTION 4 OF ERF 1219*
	DIE WILGERS EXTENION 49
	REGISTRATION DIVISION J.R.
	PROVINCE OF GAUTENG
MEASURING	*447 (Four Four Seven) SQUARE METRES*
HELD	*BY DEED OF TRANSFER NO. T58918/2002*
	(also known as 1918 Bee-Bee Street, 4 The Willows Lofts
	Die Wilgers extension 49)

2. Further and/or alternative relief".

[3] I requested counsel for the plaintiff to prepare written heads of argument and to deal with the issue that I raised as follows:

"Is an order directed to the Registrar to issue a warrant of attachment against the immovable property necessary, where an order to declare the property specially executable has already been granted?"

[4] Just as a background to the question raised above, on the 24 June 2011, the plaintiff's counsel moved an application for default judgment against the defendant as follows:

*"**WHEREFORE the Plaintiff claims is against the Defendant as claimed in the summons for:***

1. *Payment of the amount of R1 177 430.20*
2. *Interest on the amount of R1 177 430.20 at the rate of 9.50% per annum, from 21 SEPTEMBER 2010 to day of final payment, such interest calculated and capitalized monthly in arrears.*
3. *An order in terms whereof the property described below be declared specially executable*

ERF:	*PORTION 4 OF ERF 1219* *DIE WILGERS EXTENION 49* *REGISTRATION DIVISION J.R.* *PROVINCE OF GAUTENG*
MEASURING:	*447 (Four Four Seven) SQUARE METRES*
HELD:	*BY DEED OF TRANSFER NO. T58918/2002* *(known as 1918 Bee-Bee Street)*

4. *Costs to be taxed on a scale as between attorney and client as per clause 12 of the mortgage bond attached to the summons.*
5. *Further and/or alternative relief."*

[5] There are two court orders in the file made on the 24 June 2011 and 4 November 2011 respectively. The two orders are in terms of the prayers set out in paragraph 4 above. The reason for similar two court orders was not given.

[6] When I raised the issue as set out in paragraph 2 of this judgment, counsel for the plaintiff sought to suggest that such an order is provided in Rule 46(1) (a) (ii). The Rule reads as follows:

> *"46. **Execution – Immovables***
>
> *(1) (a) No writ of execution against the immovable property of any judgment debtor shall issue until–*
>
> *(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ, or*
>
> *(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.*

[7] I have a problem in finding that Rule 46(1) (a) (ii) envisages a situation as suggested. The effect of the suggestion amounts to this:

7.1 That before the Registrar can issue a writ of execution against immovable property which is a primary residence the following steps must have been adhered to:

7.1.1 The plaintiff must first obtain an order declaring such a property specially executable and that,

7.1.2 The plaintiff thereafter must apply for and obtain an order directing the Registrar to issue a writ of execution or attachment against the immovable property concerned.

[8] Perhaps put it differently this way, is the court hearing an application to declare a primary residence property specially executable, obliged to exercise judicial oversight whether or not

to make such a declaratory order? And if so, whether an exercise of such a judicial oversight granting an order of declaration, should not entitle the Registrar to issue the writ of execution without making another application for the granting of an order to execute the immovable property which is a primary residence?

[9] I do not think Rule 46(1) (a)(ii) obliges the court to direct the Registrar to issue a writ of execution or attachment of immovable property which is also a primary residence before the Registrar could be entitled to issue such a writ once an order of execution is made under the rule aforesaid.

[10] In my view, once a declaratory order for specially execution of immovable property which is also a primary residence, is made, the judgment creditor should be entitled to prepare a writ of execution for issue by the Registrar.

[11] All what rule 46(1)(a)(ii) does, is to oblige the court to consider all the relevant circumstances where the immovable property is a primary residence, and if satisfied that an order could be made, then proceed to make such an order of execution against such a property.

[12] It makes sense to me to read Rule 46(1) (a) (ii) in this context. I am unable to see significant difference between declaring immovable property which is a primary residence to be specifically executable and making an order of execution against such a property as intended in the proviso.

[13] This then brings me to deal with the issue raised earlier in paragraph 2 of this judgment. The issue in my view, should be considered in conjunction with the principle laid down in the case of Elsie Gundwana v Steko Development cc & Others 2011 3 SA 608 CC.

[14] Of importance for the purpose of the present issue before me, it was found in the above mentioned case that evaluation of the facts to determine whether a declaration that a hypothecated property constituting a person's home is specially executable, must be made by a court of law. Such evaluation of the facts is necessary in each case, particularly where the immovable property in question constitutes a person's home. (**See paragraph 49 of the case referred to above**).

[15] Execution orders relating to a person's home all require evaluation (underlining my own emphasis). Declaration of immovable property specially executable is an order of execution and therefore requires judicial evaluation and consideration of all relevant factors. (**See further paragraph 50 in Gundwana's matter**).

[16] There is a potential invasion of home owner's right under section 26 (1) and (3) of the Constitution by the granting of an order to declare the property that is a primary residence to be specially executable, particularly if such an order is granted without judicial oversight.

[17] It would not be a judicial oversight if only procedural aspects are considered when declaring immovable property that is also a primary residence specially executable. Such a declaration is fundamental to one's right in terms of section 26 of the Constitution. It therefore requires one to make a value judgment. Due regard should be taken at an early stage of execution regarding the impact thereof. For example it could have a negative impact on the judgment debtors, who are poor and at the risk of losing their homes. One needs to consider whether the judgment debt could be satisfied in a reasonable manner without

involving drastic consequences of execution against a person's home.

[18] Alternative course should be judicially considered before granting execution orders. (**See paragraph 53 in Gundwana's case**). Such an alternative course in my view could be the granting of judgment coupled with a postponement of a relief for declaration of the immovable property to be specially executable. This has to be done where the court under Rule 46 (1) (a) (ii) is dealing with a primary residence.

[19] I think a party who wishes to have default judgment granted, and at the same to have a declaration of the property to be specially executable, should place before the court necessary and reliable factors that will enable the court to evaluate and consider whether or not to grant such an order.

[20] Any suggestion that such an evaluation could be done at a later stage and after the granting of a declaration order, would make no sense. It is not what Rule 46(1) (a) (ii) provides for. In my view, importation of such a procedure in Rule 46(1) (a) (ii) will defeat the purpose of Rule 46(1) (a) (ii). The Rule serves to ensure that no execution steps of whatever nature are taken in respect of immovable property which is also a primary residence without judicial oversight. This in my view is clearly spelled out in Gundwana's case.

[21] Coming back to the present case, when an application for default judgment was made, the plaintiff in the affidavit expressed itself as follows in paragraphs 7 and 8:

"7.

"*According to my knowledge the property is occupied.*

The property is used for residential purposes".

[22] When the two court orders of the 24 June 2011 and 4 November 2011 referred to in paragraph 5 of this judgment were made, the court was aware that it was dealing with immovable property which was a primary residence. It must therefore have found that necessary fundamental factors were placed before it to make an order of declaration. Whether rightly so or not, is not for me decide.

[23] It suffices to mention that i see two scenarios been envisaged under rule 46 (1) (a) (ii).The first scenario relates to immovable property which is not a primary residence or in respect of a judgment granted by the register under rule 31(5). Remember in Gundwana's matter, the case was confined to the potential invasion of a homeowner's right under section 26 of the Constitution. Therefore, the first part of rule 46 (1(a) (ii) should be seen as referring to instances where evaluation is not required. The second part of the rule refers to a situation where the immovable property is a person's home or primary residence as is referred to in the rule. Here evaluation is required seen in the light of the provisions of section 26 of the Constitution. The court is called upon to exercise a judicial oversight before making an order of execution against a primary residence property. It does not matter whether it is a declaratory order as envisaged in the first part or an execution order as envisaged in the second part. For as long as a primary residence property is involved, a judicial evaluation is required.

[24] Once an order of execution is made, the registrar issues a writ of execution, which entitles the Sheriff to attach. Attachment notice

is a document that is issued by the Sheriff in terms of which he describes when the writ was executed or when the attachment was made and the description of the property so placed under attachment.

[25] Now if in terms of the relief sought, it was intended to refer to directing the registrar to issue a writ of execution, such a directive or order is not necessary in the circumstances of the case and it is not provided for in the rule.

[26] The court has already declared that the property in question which is primary residence to be specially executable. I am therefore unwilling to make an order or direct the register as suggested in the notice of application.

[27] Consequently, I make no order and also no order as to costs.

M F LEGODI

JUDGE OF THE NORTH GAUTENG HIGH COURT

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REF: N RAPPARD/pb/sm/PR2016

Heard on the 4th & 8th June 2012

Handed down: 13 June 2012