IN THE HIGH COURT OF SOUTH AFRICA

[NORTH GAUTENG HIGH COURT, PRETORIA]

01/11/2012

Case no: 45800/2012

In the matter between:

NEDBANK LIMITED	APPLICANT/PLAINTIFF
and	
THE TRUSTEES FOR THE TIME BEING OF THE PRITE TRUST IT1433/2003	1st RESPONDENT/DEFENDANT
CLIVE STUART WRIGHT	2nd RESPONDENT/DEFENDANT

JUDGEMENT

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/~~NO~~

OF INTEREST TO OTHER JUDGES: YES/~~NO~~

REVISED

2012/10/31 DATE SIGNATURE

Judgment reserved: 18/10/2012

Judgment handed down:

[1] Before me, it is an application for summary judgement. It has been brought by Nedbank Limited against two defendants, namely, the Trustees for the Time Being of The Prite Trust (IT1433/2003) and Clive Stuart Wright. The latter is sued as a surety for the debts of the Trust.

[2] The property described as Erf 1471 Brackenhurst Extension 2 Township held by the Deed of transfer no, T48235/2003 is registered in the name of the first defendant (hereinafter referred to as the Trust) and it is hypothecated in favour of the plaintiff, Nedbank Limited.

[3] When the Trust became in default in its payments as provided for in the agreement, the plaintiff issued section 129 notices to both the trust and the second defendant. Subsequent thereto, summons were issued on the 7 August 2012. On the 6 September 2012, both defendants entered an appearance to defend. This prompted the present application for summary judgement. The defendants did not file an opposing affidavit despite service of the application for summary judgement on them on the 12 September 2012.

[4] In addition to the summary judgement in the amount of R1 030 769.48, the plaintiff is also asking for the morgaged property to be declared specially executable. Whilst counsel for the plaintiff conceded that judicial oversight is required, he however argued that in doing so, I do not have to consider whether or not the property in question is used as a primary resistance.

[5] In making the point, I was urged to find that inasmuch as the property is not registered in the names of individual judgement debtor, but rather in the names of a legal entity (the trust), the issue whether or not the property is used as a primary residence is irrelevant.

[6] The submission was premised from what was stated in paragraphs 50 and 51 of the full bench decision in First Rand Bank v Folscher 2011 (4) SA 314 (GNP) at 336. In concluding, the court amongst others stated as follows:

> *"[50] The amended rule applies only to individual judgement debtors, not to corporate entities or trusts.*
>
> *[51] Its application is restricted to writs of execution sought against the judgement debtor's usual home, his or her ordinary place of residence (the primary residence). Additional dwellings such as holiday homes do not fall within its ambit"*

[7] The underlining above is my own emphasis. The Court in Folscher's matter was not dealing specifically with the same facts as in the present case. That is, where individual judgement debtor was sued as a surety for the debts of a corporate entity or trust and the property in question is used as a primary residence. Counsel for the plaintiff during his submission indicated that the property in question is apparently used as a primary residence for the second defendant and or other persons. This is not apparent from the papers, but I have no reason to doubt otherwise.

[8] Assuming that it is correct that the property is used as a primary residence, the next question is whether this is an aspect that I need to ignore and in doing so declare the property specially executable without judicial oversight.

[9] In Folscher's case referred to earlier in paragraph 6 of this judgement, the court referred to primary residence as meaning:

'A dwelling, where one usually lives, typically a house or an apartment. On the other hand 'home' according to concise Oxford Dictionary is said to mean 'the place where one lives, the fixed residence of a family or household, a dwelling house'. It is also said to mean 'a physical structure within which one lives, such as a house or apartment'. 'Housing' is said to mean 'shelter or lodging'. (see paragraphs 28.1, 28.2 and 28.3 in Folscher supra)'.

[10] Now, if it is accepted that primary residence, home and housing mean what is said to mean as indicated above, then it does not matter whether the immovable property that is used as a primary residence is owned by legal entity like a company, a close co-operation or a trust for the purpose of judicial oversight.

[11] Such an approach in my view will accord with the provisions of section 26 of the Constitution. I do not understand section 26 as affording protection only to the owners of the immovable property that is used as a home, housing or primary residence. On the face of it, clearly right to have shelter or lodging cannot be said

not to exist, unless you are owner of such shelter or lodging. Similarly, the right not to be evicted from one's dwelling, where one lives, or from fixed residence, house or apartment where one lives should be found to exist irrespective whether or not one is an owner of any such housing, residence or apartment.

[12] Remember, there could well be vulnerable people staying in a particular home, house or primary residence, such as the elders, disabled and children whose interests are protected under the Constitution. Any eviction or threat of eviction that takes place without judicial oversight on the basis that the immovable is not owned by the individual judgment debtor in my view, would amount to arbitrary eviction referred to in section 26(3). I do not see section 26(3) as protecting only home owners, but also occupiers thereof who do not necessarily have to be the owners.

[13] I do not under the judgement in Folscher's supra as quoted in paragraph 6 of this judgment, to exclude those individual judgment debtors who are not registered owners of immovable property from judicial oversight. Therefore, judicial oversight in the present case would be required due to the fact that the property in question is used as a primary residence. Put differently, the fact that the property is used as a primary residence, should be considered as a relevant factor in the exercise of judicial oversight.

[14] Even if there was no indication that the property was being used as a primary residence, I would still be worried. For example, in the summons or particulars of claim no indication is given that the property is used or not used as a primary residence either by the second defendant or by any other person. Further, in the application for summary judgment, it is similarly not indicated whether or not the property is used as a primary residence.

[15] Counsel for the applicant referred me also to another case in which Binns-Ward J in the Western Cape High Court had the opportunity to deal with the essence of the decisions in the Sebola's case , Gundwana v Steko Development CC, Rule 46 (1) (a)(ii) and section 26 of the Constitution. I was asked to specifically pay attention to paragraphs 33 and 34 of the judgment by Binns-Ward J.

[16] In paragraph 33 Binns-Ward J deals with the fact that the defendant agreed in terms of the morgage agreement that the bank would be entitled in the event of his falling into default of his contracted obligations, to institute proceedings against him for payment and for a court order declaring the morgage property specially executable. He further stated that equivalent provisions are standard in all morgaged contracts and that it is the basis for the usual practice for an order of special executability to be sought ancillary to any judgment sounding in money in matters in which fixed property has been hypothecated as a security for the

payment of the judgment debts. Having said this, he turned to the default judgment sounding in money granted against the plaintiff in that case. In referring to the Judge who granted the default judgment, Binns-Ward J then expressed himself as follows:

'It may be that, perceiving that the morgaged property was probably the defendant's home, he thought that the bank shall first excuss the defendant's movable property. If that was his approach, it was wrong with respect'

[17] The underlined in the quotation, I want to believe was meant to be 'execute'. I do not completely agree with the statement. It cannot be wrong to think or find that a bank should first execute the defendant's movable property. It will all depend on the facts of each case. For example, if a defendant has been paying for a long period of time and the outstanding balance is less than what has already been paid or the amount outstanding is minimal, one might be inclined to order for execution of the movables first. Or when one is not having sufficient information to exercise judicial oversight on whether or not to declare the morgaged property specially executable, one might be inclined to grant summary judgement or default judgement sounding in money and then postpone a prayer for declaration, hoping that when it comes back, the court will be provided with sufficient information to make a decision, one of which could be a nulla bona return on the movables.

[18] The latter suggestion should also be seen in the context of Rule 46 (1) as amended. Rule 46 (1) (a)(i) provides that no writ of execution against the immovable property of any judgment debtor shall issue, until 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 no sufficient movable property to satisfy the court.

[19] In my view, sub-rule should be understood as meaning that judgment sounding in money is possible without making an order declaring immovable property specially executable. When that happens, it cannot be said to be a wrong approach. It all depends on what is presented to the court either during an application for summary judgment or default judgement. It looks like one will have an easy ride to obtain an order for declaration of morgaged immovable property specially executable if armed with a nulla bona return on the movables. This could be inferred from the provisions of subrule (1) (a)(i).

[20] Binns-Ward J in what he referred to as the 'proper approach,' stated as follows in paragraph 34 in Peterson's matter supra:

'34 The proper approach would have been to give effect to the provisions of the morgage bond unless something about the case; whether based on information apparent on the summons or provided by the defendant, made it appear inappropriate.'

[21] I have difficulties with this statement. It might create a wrong impression, like it happened in the case before me. The suggestion was that I was bound to declare the immovable property specially executable seen in the light of the provisions of the morgage agreement. The statement seems to suggest that if the defendant is not before the court or has not placed any information before the court and there is nothing apparent on the summons to suggest otherwise, the court should without much ado find itself bound by the provisions of the morgage agreement, in which a defendant made the morgage property available for security.

[22] Any such approach will go against the principle of judicial oversight as envisaged in Rule 46(1) (a)(ii), section 26 of the Constitution and the principle laid down in the matter of Gundwana v Steko Development 2011(3) SA 608 CC.

[23] Remember, the voluntary placing at risk agreement also runs into difficulty. It is true that a morgagor willingly provides his or her immovable property as security for the loan she or he obtains from the morgagee, and that she or he accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that he or she accepts that:

(a) the morgage debt may be enforced without court sanction;

(b) she or he has waived her right to have access to adequate housing or eviction only under court sanction of section 26(1) and (3) and,

(c) the morgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith?

[24] In Gundwana's case at page 624 paragraph 44, it was held that it cannot be allowed to happen that self- help is inimical to the rule of law. It is also authority that execution upon property in respect of a morgage debt, without sanction, is not allowed (see Chief Lesopo v North West Agricultural Bank and Another 2000(1) SA 409 cc paragraph 7, Gundwana's supra 624 paragraph 45). Morgage bonds do not ordinary contain clauses describing the purpose for which the morgage property is held by the morgagor. To agree to a morgage bond does not, without more, entail agreeing to forfeit one's protection under section 26(1) and (3) of the constitution (see Gundwana's supra paragraph 6)

[25] Willingness of morgagors to put their homes forward as security for the loans they acquire is not by itself sufficient to put those cars beyond the read of Jafta's case wherein it was stated that another factor of great importance will be the circumstances in which the debt arose. If the judgment debtor willingly put his or her house up in some manner as a security for the debt, a sale in execution should ordinarily be permitted where there has not

been an abuse of court procedure. An evaluation of the facts of each case is necessary in order to determine whether a declaration that hypothecated property constituting a person's home is specially executed, may be made. It is the kind of evaluation that must be done by the court (see Gundwana's supra paragraph 49).

[26] Therefore, I understand the principle to be that even where there is no opposition for summary judgement or default judgment, the court should not just rubber stamp the application by granting a declaration order even where the court feels that it has scanty information. In that event, the court should be entitled to ask for more information in order to make informed decision. This could be done by postponing the decision on whether or not to declare the morgaged property specially executable. In doing so, one might decide to grant in the meantime, judgement sounding in money.

[27] However, it appears in the present case that the second defendant decided to abide by the decision of this court. I say so for the following reasons:

[27.1] summons having served on the defendants, they entered an appearance to defend on the 6 September 2012,

[27.2] application for summary judgment having been served on the 18 September 2012, the defendants failed to file an

opposing affidavit and secondly failed to appear for the hearing on the 18 October 2012,

[27.3] in the summons, it is averred that notice in terms of section 129 was given, track and trace document is attached to the summons. The notice was sent to the chosen address by using registered post as the chosen mode of service, and

[27.4] in the summons, the defendants' attention is also drawn to the fact that in terms of section 26(1) of the Constitution, everyone has the right to have access to adequate housing and that should the defendants feel that the execution order will infringe their right to housing, it was incumbent on them to place information to resist the application for summary judgment.

[28] All of the above would have raised a red flag to the defendants. They were warned of the impending execution order. The second defendant declined to take the opportunity to defend the application for summary judgement. I should therefore be entitled to assume that he has no defence to avert the summary judgement being granted.

[29] Therefore, despite what I said in the preceding paragraphs, I am left with no option than to grant summary judgment as follows:

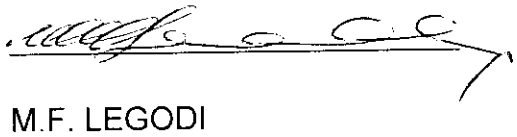
[29.1] Payment of R 1 303 769.48.

[29.2] Interest thereon at the rate of 8.15 per annum as from the 1 day of the 2012 to date of final payment which interest is to be capitalised monthly in advance.

[29.3] An order is hereby granted declaring the morgage property executable for the said sums and costs in terms of the first morgage Bond no.B 033664/03 and the second morgage Bond no. B014660/08 and more fully described as:

ERF 1471 BLACKENHURST EXTENSION 2 TOWNSHIP, REGISTRATION DIVISION I.R THE PROVINCE OF GARTENS MEASURING 1600 (ONE THOUSAND SIX HUNDRED) SQUARE METRES HEAD BY DEED OF TRANSFER NO T48235/2003. SUBJECT TO THE CONDITIONS THEREIN CONTAINED AND ESPECIALLY TO THE RESERVATION OF RIGHTS TO MINERALS ALSO KNOWN AS 23 IRIS STREET, BRACKENHURST EXTENSION 2.

[29.4] Costs of suit on an attorney and client scale.



M.F. LEGODI

JUDGE OF THE HIGH COURT

VELILE TINTO & ASSOCIATES

ATTORNEYS FOR THE APPLICANT

225 RONDEBULT ROAD

BOKSBURG

TEL (011) 913 4761/8

FAX (011) 913 4740

REF: NM MADISA/cm/L2689

LEON SWANEPOEL

ATTORNEYS FOR THE DEFENDANT

8 NEW QUAY ROAD

ALBERTON

REF: L SWANEPOEL/W82/002

C/O VAN DER BOGERT GOLDNER

940 DUNCAN STREET

BROOKLYN

TEL: (012) 346 1213

Ref: Manda Best