IN THE NORTH GAUTENG HIGH COURT.

PRETORIA (REPUBLIC OF SOUTH AFRICA)

Case no. 12133/2011

DATE:13/06 2012

IN THE MATTER BETWEEN:

STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

NATHA DENISE REGINA

Respondent

JUDGMENT

LEGODI J

1. Counsel who appeared in this matter also appeared in the matter of ABSA BANK LTD v MATHSEDISO MILLICENT SETAI under case number 14498/11. The relief sought in the present case is more or less the same as the relief sought in Setai's matter.

2. The relief in the present case is as follows:

"1. THAT pursuant to the default judgment granted by the Registrar of the above Honourable Court under the aforementioned case number, on 26 JANUARY 2012, the Registrar of the above Honourable Court is authorised to issue a warrant of execution in respect of the aforesaid default judgment and the immovable property identified in paragraph (3) of the default judgment

2. THAT the respondent to pay the costs of this application on an attorney and client scale in the event of her opposing the application".

3. This is said to be a relief as envisaged in Rule 46(1) (a) (ii). The rule reads as follows:

"(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until-

(ii) such immovable property shall have been declared to be specifically 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 a primary residence of the judgment debtor ,no writ shall issue unless the court , having considered all the relevant circumstances, orders execution against such property"

4. In Setai's matter the applicant asked the court to direct the Sheriff to issue a writ of attachment purportedly in terms of Rule 46(1) (a) (ii). I made an order in Setai's case to the

effect that such an order was not necessary and that it is not provided for in Rule 46(1)(a)(ii). An order in that case, declaring the immovable property which is also a primary residence was made by a court as envisaged in the Rule.

5. Coming back to the present case, declaratory order for specially execution of the immovable property was made by the Registrar on the 26 January 2012.

6. The followings preceded the order of declaration aforesaid: On the 22 February 2011 the plaintiff issued summons against the defendant The defendant is said to have failed to pay in terms of a mortgage bond that was passed in favour of the plaintiff on the 25 April 2008.

7. The defendant did not enter an appearance to defend. On the 21 November 2011 the plaintiff prepared a notice of application in terms of Rule 31(5). Rule 31 (5) provides as follows:

"(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.

8. However, on the 26 January 2012, the Registrar granted judgment as follows:

"1. Payment of R637 088.49 together with interest thereon at the rate of 9.00% per annum, compounded monthly from the 10 JANUARY 2011 to date of final payment, both days inclusive:

3. An Order declaring the following property specially executable for payment of the aforesaid sum or part thereof:

SECTION NO. 139 as shown and more fully described on SECTIONAL PLAN NO. SS200/2007 in the scheme known as MILPARK MEWS, in respect of the land and building or buildings situate at BRAAMFONTEIN WERF TOWNSHIP, CITY OF JONNESBURG, of which section the floor area, according to the said sectional plan is 42 (FORTY TWO) SQUARE METRES in extent; and

An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

HELD UNDER DEED OF TRANSFER NO. ST62521/2007

Be postponed sine die;

4. Plus costs in the sum of R650.00 plus sheriffs charges R264,45."

9. By the time the Registrar did so, Rule 46 as amended and quoted above was already in place. It is very clear that declaring immovable property specially executable can only be done by the court, either under the first part of Rule 46(1)(a)(ii) or in the second part dealing with immovable property which is also a primary residence. Therefore the Registrar as on the 26 February 2012 had no authority to make such an order of declaration.

10.Whilst it is not clear from the papers, whether the property in question is a primary residence, I think it is important to make such an averment if a party wishes to have immovable property to be declared specially executable or an order of execution against such a property. Reference to section 26(1) of the Constitution in paragraphs 6 and 7 of the particulars of claim, in my view is not sufficient. I think it would not be impossible for a credit provider to establish whether the property is a primary residence or not.

11.Before I conclude on the Registrar's lack of authority to declare immovable property specially executable, it is important to touch on the principle laid down in Gundwana v Steko Development cc & Others **2011 (3) SA 608** CC. This is a judgment that was delivered on the 11 April 2011. Declaration of immovable property to be specially executable was found to be unconstitutional because it was sanctioned by a Registrar who could not exercise judicial oversight.

12. Coming back to the relief sought, that is, authorising the registrar "to issue a warrant of execution in respect of the aforesaid default judgment and the immovable property identified in paragraph (3) of the default judgment", I am unwilling to grant such an order for the following reasons.

12.1 The registrar does not need any authorisation for the purpose of issuing a writ of execution in respect of default judgment granted in the amount of R637 088.49. This should be seen as a judgment granted by default in terms of Rule 31(5).

12.2 As for an order declaring the immovable property specially executable, the effect of what I am been asked to do is to perpetuate the constitutional invalidity of the registrar's action.

12.3 The registrar had no authority to make such an order of declaration. As I said earlier in this judgment, it is only the court that can make such an order of declaration.

12.4 Lastly, had an order of declaration been made by a court in the present case, I would still be reluctant to make an order authorising the registrar to issue a writ of execution. Such an application is not necessary and is not provided for inRule46(1)(a)(ii).

12.5 The effect of Rule 46(1) (a)(ii) is that, unless a declaration is made by court or unless an execution order is made by the court as envisaged in the proviso, the registrar would not be competent to issue a writ of execution or attachment. Similarly there can be no talk of

issue of writ unless a court order is made with regard to declaration of specially execution or execution as envisaged in the proviso.

12.6 Rule 46 (1)(a)(ii) in my view should be understood to mean that once a court had declared immovable property specially executable, the registrar should be entitled to issue a writ of execution. The plaintiff prepares a writ of execution and thereafter submits it to the registrar for issue. The application is therefore destined to be dismissed.

13. Should the plaintiff wish to pursue declaration, it will be entitled to apply to court for such an order properly motivated. I want to imagine that should this be the chosen route, the plaintiff will bear in mind amongst others, what is articulated in Gundwana's supra and also in Sebolas' Vs Standard Bank SA Ltd & Others case number CCT 98/11 **[2012] ZACC 11.**

14. Consequently I make an order as follows

14.1The application is dismissed.

14.2No order as to costs.

LEGODI

JUDGE OF THE HIGH COURT

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