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**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION, MIDDELBURG
(LOCAL SEAT)**

- | | |
|-----|---------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED: YES |

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SIGNATURE

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DATE

CASE NO: 727/2016

In the matter between:

FIRSTRAND BANK LIMITED

APPLICANT

and

SINDISO LESLEY MGEDESI

1ST RESPONDENT

MSUKALIGWA LOCAL MUNICIPALITY

2ND RESPONDENT

JUDGMENT

BRAUCKMANN AJ

- [1] This is an application in terms of Rule 46 A of the Uniform Rules of Court for an order authorising the Registrar of this court to issue a warrant of execution against the First Respondent's immovable property.
- [2] The Applicant obtained default judgment against the First Respondent on 30 June 2016. Default judgment was granted in favour of the Applicant for payment of the amount of R 1 485 515.46 together with interest and costs as provided for in the court order.¹ Declaration of excecutability of the property in question was however not granted, but postponed *sine die*.
- [3] The Applicant, after having obtained default judgment, caused a Writ of Execution against movable property to be issued by the Registrar,

¹ Bundle, Page 81

which writ was issued on 10 March 2017, and executed on 31 May 2017. The Sheriff of the court provided the Applicant's attorney with a *nulla bona* return.² Subsequent thereto the current application was launched by the Applicant.

[4] The application was served on the First Respondent at his chosen *domicilium citandi et executandi* by affixing a copy thereof to the outer principal door as no other means of service was possible. The application was further served on one Mr. Vusi Zulu who appears to be the occupant of the subject property.³

[5] Mr. Zulu alleged that he purchased the property from the First Respondent and was paying the purchase price into the trust account of one Mr. Danie Van der Walt Attorneys.

[6] The matter was set down on the unopposed roll for 6 May 2019. I alluded the Applicant's counsel, Advocate Louw, to the judgment of Mathunzi AJ in the matter of **ABSA Bank Limited v. Schuurman**⁴. In the said judgment the learned judge found that:

² Bundle, Page 86

³ Bundle, Pages 124 and 125

⁴ 2019 JDR 0353 (GP)

"[24] I now revert back to the issue of non-joinder. In an application of this nature, a court has a discretion to postpone the granting of an order declaring property executable or even its operation where the property is a debtor's primary residence if the order will violate a constitutional right, S 26 right to adequate housing. In casu, the property is occupied by a tenant who was not cited in the papers and I have been reliably made aware of the fact that the said tenant is using the said property as his primary residence, I find no harm in invoking the application of S 26 to protect the tenant from being affected adversely.

[25] In terms of section 172 (1) (b) of the constitution, a court determining an issue having a bearing on constitutionality enjoys a wide discretion within its powers to grant a just and equitable relief. I am satisfied that the tenant has a direct and substantial interest in the matter.

[26] The contention by the applicant to the effect that the tenant should not be joined in this proceedings is flawed. The non-joinder of the tenant is fatal to the relief sought by the bank."

[7] The court in arriving at this decision referred to various judgments, but did not take cognisance of the judgment of the full bench in **ABSA Bank Ltd v. Mokebe** and related cases,⁵ at paragraph 70 the court had the following to say:

⁵ 2018 (6) SA 492 (GJ)

“Of the four matters referred to this full court the matter of Standard Bank must be distinguished. In this matter the judgment and execution sought are not in relation to a primary residence. The facts show that the respondents reside in New Zealand and that they are letting the property to third parties. They are not indigent, vulnerable debtors at risk of losing their home. Their constitutional right to access to adequate housing is not implicated. Indeed, they appear to be receiving a rental income from the property while evading their obligations. In such cases the ordinary commercial consequences should follow and Standard Bank should be entitled to judgment for the amounts owing and to have the property declared specially executable.”

[8] No mention is made by the court of any requirement to join the occupiers. Given the nature of the issues decided upon and the comprehensiveness of the judgment, it can be accepted that if the judges deemed a joinder of the occupants necessary, they would have said so.

[9] The Schuurman judgment was delivered after the decision of the full court in the Mokebe-matter. Mathunzi AJ was therefore bound by the full court's judgment and it is respectfully submitted that the abovementioned *dictum* ought to have been applied.

[10] The court specifically referred to Erasmus: Superior Court Practice at B.1-94 where the learned author states:

"The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court."

[11] Specific reference is made to the judgment in **Henri Viljoen (PTY) LTD v Awerbuch Bros**⁶. It is my opinion, with respect, that the learned judge misunderstood the requirements for joinder of a party, specifically with reference to the Henri Viljoen case. An analogy can be drawn to the facts of the Henri Viljoen case. In the said case, on page 167, the court states the following:

"This view, concurred in by FAGAN, J.A. who was responsible for the reasons for judgment in the Amalgamated Union Case, might be legitimately employed to attempt to define somewhat closer the meaning to be assigned to 'a direct and substantial interest' as used in the earlier appellant division decision. Where such a sub-tenant is sued

⁶ 1953 (2) SA 151 (O)

by an owner for ejectment, the Defendant relies on a right of occupation derived from the lessee whose rights, in turn, depend upon his contract with the lessor. In the proceedings by the lessor against the sub-lessee, the adjudication upon the rights inter parties involves also the rights of the lessee who derives his right directly from the lessor while the sub-lessee claims his right mediately or indirectly also from the lessor. Where, **however, the lessor sues his lessee, any rights of a sub-lessee are not in any way in issue in the proceedings; the sub-lessee has no 'legal' interest in the contract between the lessor and the lessee although he may have a substantial financial and commercial interest therein which may be prejudicially affected by the judgment. If this distinction be correct, it immediately explains why a Plaintiff need not join a sub-lessee...**" (my own emphasis)

[12] The occupier has the sole interest of occupation. That interest is not related to the subject matter of the proceedings to have immovable property declared specially executable.

[13] The test for joinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal

interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.⁷

[14] The subject matter of an application to have immovable property declared executable, in circumstances where the property is not the primary residence of the judgment debtor, is limited to two aspects:

[14.1] The judgement debtor's right of ownership in the property; and

[14.2] The judgment creditor's entitlement to execute upon its judgment.

[15] The subject matter of such application does not relate to the rights of an occupier who is not the judgment debtor. Such an occupier is a third party with no interest or involvement in respect of the judgment and cannot bring an influence to bear upon the considerations whether an order is granted to enable the judgment creditor to execute on his judgment. The tenant does not have any rights that will be adversely affected that is not properly protected in law. Thus the interest which an occupier may have in occupying the property, does not constitute an interest requiring joinder. The submission that an

⁷ Henri Viljoen *supra*, at 168 to 170

occupier need not be joined in proceedings relating to executability, is further strengthened by the fact that the interest of an occupier enjoys separate, but comprehensive legislative protection by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (**"the PIE Act"**). In the preamble to the PIE Act it is provided for:

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

[16] In the event that an immovable property is declared executable and sold at auction, the new owner of the property will be compelled to comply with the provisions of the PIE Act before the occupiers may be evicted. In that sense the occupiers or tenants' rights enjoys comprehensive protection. The fact that Section 26 of the Constitution⁸ which determines that:

"[1] Everyone has the right to have access to adequate housing;

⁸ Act of 1996

[2] *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;*

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

although this is a basic human right protected by the Constitution, it does not provide the tenant with a "*direct and substantial interest*" in the dispute between the Applicant and the First Respondent. The *lis* between the Applicant and the First Respondent is simply to have the property that the tenant occupies declared specifically executable, and to sell the property at a sale in execution in order to enable the Applicant to recover money due to it by the First Respondent.

[17] I am, with respect, of the opinion that the judgment in Schuurman is clearly in wrong.

[18] Rule 46 A of this court's rules applies whenever an execution creditor seek to execute against the residential immovable property of a

judgment debtor. Whenever such is sought, and more specifically in terms of Rule 46 A (3), a substantial application must be made in terms of the said rule. The application must substantially conform with Form 2 A of Schedule 1, and:

- "b. on notice to the judgement debtor and any other party who may be affected by the sale in execution, including the entities referred to in Rule 46 (5) (a): provided that the court may order service on any party it considers necessary;*
- d. served by the Sheriff on a judgment debtor personally: provided that the court may order service in any other manner."*

[19] It is clear that the legislature, when it drafted the rule provided for service of Rule 46 application on other parties than the judgment debtor.

[20] Where the property sought to be executed against is not the primary residence of the judgment debtor personal service on the judgment debtor is not necessary.

[21] I am of the opinion that a tenant might have a financial interest and an interest in so far as security of tenure is concerned in the property. That, however, does not translate into a “*legal interest*” that requires joinder of the tenant. I am however of the opinion that because a sale in execution, will or, may affect the rights to accommodation that the tenant has or might have in terms of Section 26 of the Constitution, such process must be served on such tenant. I therefore find that the Applicant, *in casu*, do not have to join the tenant as a party to the proceedings, but as it did, has to serve the application on the tenant. The tenant may then, if it can prove that it has a direct and material interest in the litigation, apply to be joined as a party to the proceedings, but no such duty rests on the Applicant.

[22] Service of the process on the tenant is sufficient and must happen in every case where the immovable property is not occupied by the judgment debtor personally, but by a tenant/occupier.

[23] Although an occupier is entitled to protection of Section 26 (1) of the Constitution, Mathunzi AJ wrongly invoked the provisions of that section in the application to have immovable property declared executable. The occupier's entitlement to protection in terms of Section 26 (1) will unavoidably arise in any future eviction application (if any). Thus, not only are the occupier's rights not at issue in applications

to have immovable property declared specially executable, those rights enjoys separate and distinct protection. It would be an unnecessary and ineffective application of the law to afford a person protection where he already enjoys such effective protection in term of the PIE Act.

[24] *In casu* I am satisfied that:

[24.1] Default judgment was granted against the judgment debtor;

[24.2] The judgment that was obtained in August 2016 remains unsatisfied;

[24.3] The total outstanding amount as at 12 January 2019 amounts to R1 853 444.32;

[24.4] The arrears as at 12 January 2019, amount to R450 187.61, which constitutes 29,8 months of missed payments;

[24.5] The property is not the primary residence of the judgment debtor;

[24.6] The application was served on the occupant personally;

[24.7] The market value of the property is estimated to be R 1 650 000.00.

[25] Given the outstanding amount and the value of the property, equity in the property has already been destroyed. There is already a significant likelihood that the property will not be sold in execution for an amount that exceeds the outstanding amount due to the Applicant.

[26] The Applicant has already obtained a *nulla bona* return and the judgment debt is so substantial that there is virtually no likelihood that it could be settled in any other manner than the sale of the immovable property. The interest on the outstanding balance keeps on running up and it is in the best interest of the judgment debtor as well as the Applicant that this application be granted.

[27] The court wants to extend its appreciation to Advocate NG Louw for the Heads of Argument that was of great assistance to the court.

[28] The following order is accordingly made:

[28.1] The property: Erf [...] Ermelo Extension 17 Township; Registration Division IT Province of Mpumalanga; Measuring: 1152 square metres; Held by virtue of Deed of Transfer No T18030/2015, and subject to such conditions therein contained, situated at 6 Gustav Preller Street, Ermelo, Mpumalanga is declare specially executable in terms of Rule 46 A (8) (d) and may be sold by the Sheriff without a reserve price;

[28.2] The Registrar is authorised to issue a writ of execution against the immovable property described in [28.1] in terms of Rule 46 (1) (a) (ii) read with Rule 46 A (2) (c);

[28.3] The First Respondent to pay the costs of this application on an attorney and client scale.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT: ADVOCATE NG LOUW

INSTRUCTED BY: RWL INC

C/O TERBLANCHE-PISTORIUS INC

COUNSEL FOR THE RESPONDENT:

INSTRUCTED BY:

DATE OF HEARING: 27 MAY 2019

DATE OF JUDGMENT: 5 JUNE 2019