



SUPREME COURT OF APPEAL, SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

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NPGS Protection and Security Services CC & another v FirstRand Bank Ltd (314/2018) [2019] ZASCA 94 (06 June 2019).

Today, the Supreme Court of Appeal (SCA), by majority, dismissed an appeal brought by the first appellant, NPGS Protection and Security Services CC and the second appellant, Mr Llewellyn Rwaxa against a judgment of the Gauteng Local Division of the High Court, Johannesburg.

The issue in the appeal was whether summary judgment was correctly granted against the appellants by the high court. If summary judgment was properly granted, an ancillary question was whether the high court was correct in declaring the immovable property of Mr Rwaxa specially executable.

On 6 May 2009, the respondent, FirstRand Bank Ltd and NPGS concluded a written credit facility agreement in terms of which the respondent advanced an amount of R250 000 to NPGS. Mr Rwaxa bound himself as surety and co-principal debtor on behalf of NPGS in favour of the appellant for payment of all amounts due by NPGS to the respondent. The loan under the credit facility was further secured by a covering mortgage bond registered by Mr Rwaxa over his immovable property, in favour of the respondent. At the time that the credit facility was advanced to NPGS, Mr Rwaxa had already, in January 2007, registered a mortgage bond in favour of the respondent in the sum of R2 000 000, over his immovable property (the property). NPGS defaulted on its repayment obligations.

The respondent issued combined summons in the high court against the appellants for payment of an amount of R649 197.39 and an order declaring the property of Mr Rwaxa specially executable. The provisions of s 26 of the Constitution, regarding the right to have adequate access to housing, and of rule 46(1), regarding the judicial oversight, were drawn to the appellants' attention. The appellants defended the matter and the respondent applied for summary judgment. In their opposing affidavit, the appellants put up certain defences in relation to the loan. However, they did not deal with the prayer for execution against Mr Rwaxa's property.

During the hearing, it was submitted from the Bar that the property was the primary residence of Mr Rwaxa. The high court found that the appellants did not disclose a bona fide defence to the action and granted summary judgment against both the appellants. As to the execution order, the high court concluded that Mr Rwaxa was not entitled to its judicial oversight because the principal debtor, NPGS, was a juristic person. It accordingly made an order declaring the immovable property of Mr Rwaxa specially executable.

On appeal, the same arguments in respect of the loan as contended in the high court, were advanced. The court (per Makgoka JA) unanimously dismissed the appeal against the granting of summary judgment, and held that the appellants' contentions did not constitute a bona fide defence. With regard to the order of execution against Mr Rwaxa's home, the court was unanimous that the high court misdirected itself with regard to the basis on which it declined to exercise judicial oversight over the execution of Mr Rwaxa's property. However, the court was not unanimous as to the consequence of the high court's misdirection.

In a minority judgment, Makgoka JA concluded that the prayer for execution should be remitted to the high court on the basis that its decision not to exercise judicial oversight over Mr Rwaxa's property was based on an erroneous basis. Furthermore, the court's oversight role was not ousted when the loan giving rise to the action was not secured to purchase a home, but to finance a business. Makgoka JA also concluded that the remissness of Mr Rwaxa's legal representatives in not including in the opposing affidavit relevant factors regarding his property, did not disentitle him to the protection afforded in s 26(3) of the Constitution.

The majority (per Davis AJA), with Navsa ADP, Mbha JA and Mokgohloa AJA concurring, concluded that Mr Rwaxa had spurned all the opportunities afforded to him to place the relevant circumstances before the court regarding execution against his property. Also, that Mr Rwaxa was not entitled to the court's oversight role because the loan which gave rise to the action was not obtained to purchase his home but to finance his business, and because he was legally represented throughout the proceedings.

Accordingly, the majority of the court dismissed the appeal with costs.

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