CASE REVIEW

Testing the limits of the South African Constitution: An analysis of *Nkwane v Standard Bank and Others* (2018)

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On 22 March 2018, the Pretoria High Court delivered the controversial judgment of Nkwane v Standard Bank and Others. The Court dismissed a constitutional challenge against rules of the court that allow the home of a debtor to be sold without a reserve price. The implication of the judgment is that a debtor's home can be sold for next to nothing, as was the case in this matter. The judgment has far-reaching ramifications for the right of access to housing. This review analyses the key issues and considers the question of whether the sale of a property without a reserve price constitutes an arbitrary deprivation of property.

Summary of the facts

This matter concerned an application brought by Nkwane against Standard Bank (the bank). Nkwane brought the application in order to challenge a sale in execution by the bank in which his property had been sold for less than 10 per cent of its value.

Prior to this sale, Nkwane and his former wife had applied for a loan of R380,000 from the bank to purchase their home. On 8 November 2011, a continual covering mortgage bond was registered over the property. However, Nkwane defaulted on his home loan in February 2012. Within the course of that year, he continued to default on his bond and made payments only intermittently.

The bank then launched an inquiry into Nkwane's matter. His response was that he was struggling to meet his debts as they fall due because of financial difficulties emanating from his divorce. Although he later tried to settle his debt, he was unable to cover all the money owed to the bank. Instalments for November and December of 2012 were also underpaid, and there were no payments for the first three months of 2013.

In January 2013, Nkwane applied for debt review. The application was unsuccessful, though. In March of the same year, he sought to be rehabilitated. This application was approved by the bank. In terms of the arrangement, Nkwane was now entitled to pay less than half of his normal instalments for a period of six months beginning in June 2013 and ending November 2013.

Nevertheless, Nkwane still defaulted on his payments. In June 2014, he informed the bank that, due to the two-year separation from his wife, he could not afford the instalments and wanted to sell the house. The bank then informed him that he had to make use of the bank's Easy Sell Department (Easy Sell), a department that assists distressed homeowners in marketing and selling their properties. It did not come to pass, however, because Nkwane's wife refused to sign the Easy Sell mandate.

On the heels of this failure, the bank then instituted legal proceedings against Nkwane. Pursuant to these proceedings, the bank acquired a warrant of execution against Nkwane's property. In terms of such a warrant, a debtor's property can be attached and sold at a sale in execution. The then rule 46(12) allowed for such execution

to take place without a reserve price being set. In 2015, Nkwane's property was attached and sold for R40,000, despite its valuation at R492,470.

Issue

In this matter, the Court had to deal primarily with the constitutionality of the pre-December 2017 High Court rules which allowed a creditor to attach and sell a property without a reserve price. Rule 46 of the Uniform Rules of the Court at the time read as follows: 'Subject to the provisions of subrule (5), the sale shall be without reserve and upon the conditions stipulated under subrule (8), and the property shall be sold to the highest bidder.' The rule was since amended during the proceedings to reflect that a reserve price can be set in certain situations. However, at least nine factors have to be taken into consideration.

In addressing the primary issue, the Court had four considerations to make: whether (1) a sale with a reserve price results in a higher purchase price; (2) a sale without a reserve price constitutes an arbitrary deprivation of property, contrary to section 25 of the Constitution; (3) the amendment of the rules rendered previous regulations defective; and (4) rule 46 infringed the right to adequate housing.

While all four questions were essential to the judgement, this review focuses on the second and fourth issues, which concern rights with an important bearing on the social conditions of these debtors.

The Court's analysis

The Court began by dispelling the idea that this was a case of the big, bad and powerful (Standard Bank) pitted against the small (Nkwane). It was of the view that, in analysing the matter, it had to be aware that Standard Bank had gone out of its way to assist Nkwane in course of recovering the debt. Among other things, it reduced Nkwane's payable instalments by half and offered to market and sell the property out of hand, outside of a sale in execution.

This offer had not been accepted, though, because Nkwane's wife refused to sign the mandate empowering this process. This deprived him a voluntary sale, which generally realises more money than a sale in execution. The Court noted that had the institution representing Nkwane assisted him instead in obtaining a court order compelling his wife to sign the mandate, the matter in all probability would not have resulted in court proceedings.

The Court also considered whether the loan to Nkwane was a case of reckless credit. It took the position that, when the loan was approved, he was able to service the debt. The defaults only began shortly after the loan was granted, which the Court attributed to Nkwane's separation and divorce.

The Court then turned to the question of whether selling a property valued at R470,000 for R40,000 – to realise a debt of R370,000 – is procedurally and substantively unconstitutional. It began by looking at whether rule 46(12) violated the right to housing. Here, the Court relied on two cases that dealt with the same issue: ***Mouton v Absa*** and ***Haylock v Absa***. In both instances, the Court came to the conclusion that rule 46(12) did not constitute an unjustifiable limitation on the right to housing. Further to this, it referred to ***Bartezsky v Standard Bank,*** where the Court found that 'neither rule 46 in general, nor sub-rule 46(12) in particular, permits arbitrary deprivation of property, whether substantially or procedurally'.

The Court also assessed a submission by the South African Human Rights Commission (SAHRC), which raised two main points. The first, in connection with socio-economic rights (SERs), contended that sales in execution, particularly those without a reserve price, threatened the right to access to housing. This submission was based on the Commission's understanding of international law. The SAHRC referred the Court to its obligation in section 39(1) of the Constitution to consider foreign international law. It cited ***Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others,*** where the court referred to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which prioritises the right to housing and obliges member states to take measures to realise this right. Furthermore, the SAHRC made reference to the laws in South

Korea, France, Ghana and Germany which require property to be sold with a reserve price.

In regard to this first, the Court found there was no violation of section 26 of the Constitution. Its reasoning was that the SAHRC's presentation did not furnish any evidence proving that the absence of a reserve price violates the right to access to housing. The Court also said that the SAHRC failed to demonstrate that the lack of a reserve price is inherently unreasonable.

The second point argued by the SAHRC was that Rule 46 violated the right to property. This argument was also contained in the submission of the applicant. The understanding was that a sale in execution without a reserve price would lead to an arbitrary deprivation of the debtor's property, in violation of section 25 of the Constitution. Such a sale, in their view, violated the right to equity in the property. The finer point of this argument was that when a property is sold for less than its real value, such a forced value then triggers an arbitrary deprivation of property.

In response, the Court reasoned that the affidavits of the applicant did not demonstrate that a reserve price would lead to a higher price at a sale in execution. It noted that, by contrast, the affidavit of Standard Bank indicated that sales in execution with a reserve price reflected the very nature of a sale in execution – a forced sale. Furthermore, sales in execution are often shrouded in uncertainty because of last-minute cancelations or agreements between debtors and creditors. Moreover, buyers avoid sales in execution because they often entail that the buyer cover outstanding rates and taxes.

From this perspective, the Court saw no reason to accept these arguments, which were also accepted in the ***Mouton*** matter. It admitted the submission by Standard Bank that there was a general misconception that mandatory reserve prices attract higher prices. The accepted position was rather that sales in execution with a reserve price do not generate market interest and thus ultimately the property remains unsold; afterwards, problems like property depreciation start to creep in, as sale dates are usually months apart – this in turn decreases the price buyers are willing to pay in future. In the Court's analysis, it was clear that the premise that a reserve price attracts a higher-value sale was contradicted by factual evidence.

Finally, the Court noted that section 25 of the Constitution does not provide for a right to property; instead it guarantees a right against arbitrary deprivation. Whilst the sale with a reserve price led to a deprivation, such deprivation was not an arbitrary one –it was merely a method of sale.

Finding

On the basis of the analysis above, the Court found that it was improper to declare rule 46(12) unconstitutional. It reasoned that when declaring a rule unconstitutional, it had to consider the effect of such an order. In this case, the Court was of the view that a declaration of constitutional invalidity would have far-reaching consequences, as the order would affect not only banks' rights but those of third parties, who would lose their ownership of properties. Accordingly, it noted that the competing rights (the rights of the banks against the rights of the debtors) could not be balanced – and that a remedy was thus unavailable. The Court then dismissed the application without an order as to costs.

Significance

The decision of the Court is of great significance, as it has severe implications for the right to access to housing, especially so when the home in contention is the debtor's primary place of residence.

South Africa has one of the highest percentage of defaulters losing their homes per annum in the world. At least 120 default judgments are granted daily by the courts. If sales in execution are allowed to persist, all the more so when properties are sold for tiny fraction of their worth, this lands debtors in homelessness and a cycle of perpetual debt. The fact that the debtor is still liable to pay the balance of the debt after his or her property is sold for a meagre amount is a travesty of justice.

Although rule 46 has been amended to improve judicial oversight of the process and allow the

setting of a reserve price in certain instances, this amendment does not wholly solve the problem. A sale without a reserve price is still not the default position with regard to sales in execution. Furthermore, debtors whose property was attached before the amendment remain potentially subject to the pre-December 2017 rules. This means they could still be exposed to the kinds of judgements in ***Nkwane***, where homes vital to the socio-economic well-being of families are lost for irrational returns. Consequently, reserve prices should be mandated to prevent prejudice to the debtor and to safeguard the right to adequate housing of a debtor.

As Budaza (2016) argues, 'T]here is no rational connection between the purpose of the repossession of property, the subsequent sale thereof, and the outcome of the sales in execution.' This is the case in ***Nkwane***. It is a lacuna in the law that will continue to pervert justice and bring about absurd results for debtors – who are often the poor in society and in desperate need of shelter. An estimated 100,000 homes have been repossessed since 1994, with a suspected R60 billion in value being lost debtors in this process. Most of these owners have found themselves in townships, with no prospect of recovery.

The lack of justice and equity in these proceedings remains a cause of major concern. In another recent case, the Gauteng High Court, in a matter involving a debtor, Klaas Sibiya, overturned a sale in execution by Nedbank. Sibiya had fallen in arrears of his home loan of R593 000 with Nedbank for R4,000. Remarkably, the purchaser of the home was Nedbank itself. This case underlines the gravity of the injustice being perpetrated in sales in executions, notwithstanding the Court's claim in ***Nkwane*** that there are enough checks and balances when sales in execution are ordered. If the spirit of the Constitution is to be given full effect, such injustices ought not to take place.

Against this backdrop, it is suggested that no sale in execution should take place without a reserve price set by a court. While such a reserve price may not always lead to higher prices or generate interest in the sale, in a sense it balances competing interests by ensuring that properties of debtors are not sold for substantially less than what they are worth.

A base-value of 60 per cent of market value should be set as the lower threshold for sales in execution. This is important in South Africa, where sales in execution realise very little in proceeds, unlike many other jurisdictions where they recover at least 90 per cent of the property's worth. Sixty per cent is enough to generate some interest in the sale as well as meet the debtor's interest halfway in the sale.

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