

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 30996/19

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE
Judgment handed down electronically	

In the matter between:

ASSETLINE SOUTH AFRICA (PTY) LTD

Applicant

and

MANHATTAN DELUX PROPERTIES (PTY) LTD

First respondent

MICHAEL DENENGA

Second respondent

EDISON DOKO HATIRARAMI MATIENGA

Third respondent

J U D G M E N T

KEIGHTLEY, J:

1. This is an application for a money judgment against the respondents, coupled with an order declaring certain immovable property (the property) to be specially executable. The application arises out of a loan made by the applicant, Assetline South Africa (Pty) Ltd (Assetline), to the first respondent, Manhattan Delux Properties (Pty) Ltd (Manhattan). The second and third respondents, Mr Denenga and Mr Matienga, entered into suretyship agreements as security for the loan. A mortgage bond in favour of Assetline was also registered over the property.
2. The initial amount of the loan was R2,5 million. With interest, the amount due as at the institution of the application was R5 million, as evidenced by a certificate of balance attached to the founding affidavit. The loan agreement provides for a certificate of balance to stand as *prima facie* proof of the debtors' indebtedness. In accordance with the *in duplum* rule, interest stopped running on the debt when the outstanding amount reached R5 million.
3. Manhattan does not dispute that it has failed to make the outstanding repayments to Assetline pursuant to its obligations under the loan agreement. The respondents also do not place the amount of the claim in dispute. Instead, they raise a number of defences which may best be described as being highly technical.
4. The initial line of defences mounted by the respondents was to insist that the application could not proceed until such time as a consolidation application instituted by them on 17 March 2020 had been finalised. The consolidation application is not before me and remains pending. However, before I could hear the main application, I was required to deal with an application for recusal by the respondents and what became a belated application for a postponement by them. Both of those

preliminary applications featured the consolidation application as a factor. I dismissed both, and proceeded to deal with the main application.

5. The consolidation issue raises its head in the first defence raised by the respondents, viz. the defence of *lis pendens*. This is because in a separate application under case number 35073/19, one Ms Vanmali, sought an order directing the first respondent to sign the documents necessary to transfer the property to her. Her case was that Manhattan had accepted her offer to purchase the property, but had subsequently reneged on its undertaking. Ms Vanmali obtained an order against Manhattan in February 2020. Manhattan subsequently obtained an interdict in urgent court essentially putting the enforcement of Ms Vanmali's order on hold until Manhattan had initiated and finalised an application for recession of Ms Vanmali's order. I should add that, as the bondholder, Assetline was cited as a respondent in Ms Vanmali's application, and was hence cited as a party in the respondent's urgent application. However, Assetline did not play much of an active role in those proceedings, save, it would seem, to oppose the granting of the urgent application.
6. The respondents contend that the pending litigation arising out of case number 35073/19 is litigation between the same parties (they refine this to state that it is "more or less" the same parties); based on the same cause of action (they say the cause of action in both concerns the property); and the same subject matter. This, they say, satisfies the requirements for the defence of *lis pendens*.
7. *Lis pendens* may be raised where a plaintiff or applicant brings another action against the same defendant or respondent on the same cause of action and in respect of the same subject matter. The question is whether the one matter is a replication of the other. If so, the court has a discretion to decide whether or not it

is just and equitable for the one matter to proceed pending the finalisation of the matter that was instituted first.¹

8. The *lis alibi* defence finds no application in the matter before me. There is quite obviously no overlap in the causes of action in each matter. In this matter, Assetline sues as the creditor under a loan agreement. It wants an order directing the respondents to pay to it what they say Manhattan and the sureties owe under that agreement and the deeds of suretyship. Although the property features in both applications, this is not to say that the applications have the same cause of action. The property features in this application because Assetline has a mortgage bond over it to secure the loan advanced to Manhattan. Its cause of action is the loan, secured by the mortgage bond. This is worlds apart from Ms Vanmali's application, which is based on what she claimed was a binding agreement of sale in respect of the property between Manhattan and her. It follows, too, that the two applications do not involve the same parties.
9. For these reasons, I find that there is no merit in the *lis alibi* defence.
10. The next defence raised by the respondents is that Assetline has failed to comply with the requirements of Rule 46 and Rule 46A of the Uniform Rules of Court. The first submission made by the respondents in this regard is that Assetline did not first proceed to execute against movable property, and thus it cannot be permitted to obtain an order against the immovable property. They say that this is a requirement of Rule 46(1)(a)(i). In terms of Rule 46(1)(a)(ii), a creditor has an alternative route open to it where it has not executed against movable property: it is expressly entitled to seek an order from a court declaring immovable property to be specially

¹ Herbstein & Van Winsen's *The Civil Practice of the High Court of South Africa*, Volume 1, pg 310 (Herbstein & Van Winsen)

executable. This is precisely what Assetline has done here. Our courts deal with applications of this nature on a weekly basis. It is surprising that Manhattan persisted in relying on this defence in its oral submissions to me. It is patently unmeritorious.

11. The second leg of the respondent's defence in this regard relates to Rule 46A. The Rule lays down a procedure that must be followed where an execution creditor seeks to execute "*against the residential immovable property of a judgment debtor*".² Where that is the case, the court is required to establish whether the property "*which the execution creditor intends to execute against is the primary residence of the judgment debtor*". In addition, the court must consider alternative means by the judgment debtor of satisfying the judgment debt.³
12. Assetline submits, in the first instance, that Rule 46A has no application in this matter as the property is owned by Manhattan, a corporate entity, and the Rule only applies to natural persons.⁴ However, out of an abundance of caution, Assetline nonetheless included in its founding affidavit the necessary averments dealing with the relevant factors that a court is required to consider in circumstances where Rule 46A applies. It also complied with Rule 46A in providing the information relevant for purposes of determining whether the court should set a reserve price for the sale of the property.
13. In the answering affidavit, Mr Denenga, the deponent on behalf of Manhattan, states that: "*To my knowledge, the property they seek to have declared specially executable is the primary home of (Mr Matienga). The right enshrined in s26 (of the Constitution) would be implicated, and that (Mr Matienga) would be rendered*

² Rule 46A(1)

³ Rule 46A(2)

⁴ FirstRand Bank Ltd Folscher and another 2011 (4) SA 314 (GNP) at paras 32 and 50

homeless by the order of execution against his home". Mr Matienga, in turn provides a standard-form confirmatory affidavit to Mr Denenga's answering affidavit. The respondents contend that Mr Denenga's general is sufficient for this court to refuse to make an execution order against the property.

14. In the first instance, even if the property was Mr Matienga's primary residence, it is not his property. It is the property of Manhattan, a juristic person. It is thus questionable indeed whether Rule 46A applies, as Assetline initially submitted. However, even assuming that the legal position in this regard is determined by Mr Matienga's obligations as a surety against whom judgment is sought (and I make no finding in this regard), this does not assist the respondents in their defence.
15. If Rule 46A is to be applied, the court must consider whether indeed the property is Mr Matienga's primary residence. All the court has to go on here is the vague assertion by Mr Denenga that it is, and Mr Matienga's standard form confirmatory affidavit. Nowhere does Mr Matienga assert that the property is indeed his residence, let alone his primary residence. Mr Matienga signed the power of attorney for the loan in London. He signed his confirmatory affidavit in London. Various text messages between Mr Katz, the deponent to the founding and replying affidavit, and Mr Matienga demonstrate that Mr Matienga travels what appears to be frequently between London, Zimbabwe and South Africa for purposes of doing business in those jurisdictions. There is no clear evidence before me to establish that the property is, indeed, his primary residence. Mr Matienga never expressly asserts that it is.
16. However, even assuming that it is his primary residence (and I make no finding in this regard), Mr Matienga has placed nothing before the court that would weigh in

favour of the court finding that execution against the property is not warranted.⁵ An order refusing execution is obviously warranted when the effect would be to infringe on Mr Matienga's constitutional rights under section 26(3). All this court has is the bald statement by Mr Denenga that this would be the case. The statement is completely unsubstantiated. Mr Matienga himself fails to make any submissions in this regard. If there are any relevant factors which would assist the court in determining whether indeed Mr Matienga might become homeless as a result of an order of execution, the burden lies on Mr Matienga to place the relevant information before the court. He has not done so.

17. On the contrary, what the court does know from the papers is that the loan was advanced to Manhattan for purposes of a business venture: it was not to provide funding to purchase the property. From the text messages exchanged between Mr Matienga and Mr Katz, Mr Matienga holds himself out to be an international businessman involved in various ventures across international jurisdictions. At one stage, he claimed that he had access to funding in Dubai (although it has to be said that this did not result in Manhattan actually meeting its obligations under the loan agreement). He also appears (from the text messages) to be a co-owner of another property in Johannesburg valued by him at the time to be worth R9 million. Mr Matienga was also willing to sell the property to a private buyer before getting cold feet and refusing to sign the transfer documents. This fact also appears from the text messages exchanged between the parties. In short, these facts do not describe the profile of a debtor who would be rendered homeless by an order of execution against the property.

⁵ Rule 46A(2)(b)

18. In addition, the debt has been outstanding for over 18 months. It has escalated, with interest, to an *in duplum* capped amount of R5 million. Despite numerous promises that arrangements would be made to repay the debt, and despite Assetline's patience in this regard (as appears from the text exchanges), settlement has not been forthcoming. In these circumstances, it would be unwarranted of this court to deny Assetline its right to enforce its security. It is highly improbable that Assetline can realistically expect that the debt will be repaid by alternative means.
19. For all of these reasons, I find that the Rule 46A defence is without any merit.
20. The remaining defences by the respondents relate to the indebtedness of the sureties. They made the bald submission that the suretyship agreements are invalid because the loan agreement is invalid. However, the respondents failed to dispute the validity of the loan agreement in any substantial sense.
21. In addition, the respondents asserted that the sureties should escape liability because Assetline failed to comply with the requirements of the National Credit Act⁶ (the NCA). The argument advanced is that while the NCA might not be applicable to Manhattan, because it is a juristic person, it is applicable to the sureties, and they were entitled to the protections afforded under, *inter alia*, section 129 of the Act. They say they were short changed by not being served with the requisite notices under this section.
22. Once again, this defence is easily disposed of. Section 4(2) of the NCA provides that it "*applies to a credit guarantee only to the extent that this Act applies to the credit facility or credit transaction in respect of which the credit guarantee is granted.*" It follows that if the underlying credit facility is not governed by the NCA,

any deed of suretyship, being a form of credit guarantee, securing the credit transaction, will likewise not be governed by it.⁷ The suretyships entered into by Mr Denenga and Mr Matienga were thus not governed by the NCA despite the fact that they are natural persons. Assetline was under no obligation to serve section 129 notices on them.

23. For all of these reasons, none of the defences raised by the respondents have merit, and Assetline is entitled to the order for which it has prayed. The only issue I should consider (on the assumption, but not a finding) that Rule 46A may find application, is whether it is appropriate to set a reserve price for the property. A Full Court of this Division has held that a reserve price should be set “*save in exceptional circumstances ... in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order*”.⁸ In my view, the disclosed facts do not justify setting a reserve price in this matter. As I have already indicated, there is little to support the case that the property is Mr Matienga’s primary residence, and no evidence to substantiate that he is impecunious and might be rendered homeless if an order is granted without setting a reserve price. Manhattan made a business decision to take out a loan for business purposes and to agree to a bond being registered as security. It has fallen hopelessly behind on its repayment obligations. Mr Matienga is a surety, who took the risk of agreeing to enter into a suretyship agreement. It appears from the texts attached to the papers that he was the business mind behind the loan and what subsequently transpired when Manhattan defaulted. He is not the proverbial

⁷ *Mostert & others v FirstRand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA) at para 38

⁸ *Absa v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) at para 66

indigent debtor whose constitutional rights might be impaled in the event that a reserve price is not set.

24. Moreover, there appears to be a market for the property, given that Ms Vanmali made an offer to purchase for it. There does not appear to be a threat in this case that the property will be sold for a song on public auction. These are all exceptional circumstances that warrant this court declining to set a reserve price, even on the assumption that Rule 46A is applicable.
25. The final issue to deal with concerns a matter that was placed front and square by the respondents in their answering affidavit, their heads of argument and their oral submissions. It concerns the allegedly egregious conduct of Assetline's attorney, Mr Greenberg, in allowing himself to become involved in a "*deep seated*", "*unethical*" and "*highly reprehensible*" conflict of interest and in so doing, to have acted "*brazenly in an unethical manner*". On this basis, the respondents sought an order of costs *de bonis propriis* against him.
26. The respondents went on in their answering affidavit to say that Assetline's attorney (who they identify as Mr Greenberg) was involved in "*machinations*" involving "*the illicit manner in which the litigation ... commenced*" for the propose of "*unconstitutionally gaining access to the ... property through the Courts.*" Mr Greenberg was accused of abusing the court process through this conduct. These assertions were repeated by the respondents in an affidavit filed the day before the hearing. In oral submissions to the court, counsel for the respondents contended that the accusations against Mr Greenberg were accurate and true, and showed that he was involved in a scheme to permit Assetline to get its hands on the property.
27. The alleged conflict of interest arises out of the fact that Mr Greenberg acts for Assetline in this matter, and for Ms Vanmali in her application against Manhattan. It

is not clear why this should mean that there is a conflict of interest. Assetline and Ms Vanmali are not at loggerheads in her application, and she is not a party to the present application. Even if there was a conflict of interest, it is for Ms Vanmali or Assetline to raise the conflict, not Manhattan or the other respondents. Ms Vanmali filed an affidavit to say that she does not intend to raise an issue of conflict of interest.

28. It seems that the real complaint of the respondents is that Mr Greenberg is committing unprofessional, unethical and possibly even criminal conduct in using his role as attorney in both matters to undermine the law in order to deprive Manhattan of its property. There is not an iota of evidence that the two applications are an abuse of process and that Mr Greenberg has behaved unlawfully and unethically. Ms Vanmali was entitled to pursue her claim against Manhattan arising out of her offer to purchase the property. Likewise, Assetline was entitled to pursue a money judgment and execution order against the respondents and the property. None of this is unlawful or unethical. In fact, the court has weighed in on Ms Vanmali's application, and will do so again regarding the rescission (when it is launched). This court has weighed in on Assetline's perfectly legitimate application based on an entirely separate cause of action. The rule of law has not been undermined in any way.

29. When I asked counsel to clarify how the alleged conflict of interest and Mr Greenberg's alleged conduct amounted to a defence against Assetline's application, he conceded that it did not amount to a defence. This means that the very serious allegations against Mr Greenberg were not relevant for purposes of opposing the application. This obviously compounds the grievous nature of the accusations against him. What makes matters worse, is that the deponent to the answering affidavit, in which the accusations were first made, Mr Denenga, is a practising

attorney himself. While he states that the submissions he makes are on the advice of his legal representatives, he ought to have known that serious allegations of this nature should not be made unless they are relevant and can be substantiated with proper evidence.

30. Mr Greenberg was perfectly entitled to retain his own personal advocate to deal with the *de bonis propriis* costs order sought against him based on the accusations against him. He is entitled to his legal costs in this regard on an attorney and client scale.

31. I make the following order:

1. The Respondents shall pay, jointly and severally the one paying the other to be absolved, to the Applicant: -

- 1.1 The amount of R5 000 000.00;
- 1.2 Interest on R5 000 000.00 from date of judgment to date of final payment;
- 1.3 Costs of the application on an attorney and client scale;
- 1.4 The costs incurred by Attorney Joshua Gedalia Greenberg in briefing counsel to oppose the *de bonis propriis* costs order being sought against him by the Respondents, which costs shall be taxed on an attorney and client scale.

2. The following immovable property is hereby declared specially executable: -

A UNIT CONSISTING OF:— SECTION NO. 3 AS SHOWN AND MORE FULLY DESCRIBED ON SECTIONAL PLAN NO SS 129/1987 IN THE SCHEME KNOWN AS HEAVENS GATE IN RESPECT OF THE LAND AND BUILDINGS OR BUILDINGS SITUATE AT NORTHCLIFF EXTENSION 12 TOWNSHIP, LOCAL AUTHORITY CITY OF JOHANNESBURG, OF WHICH SECTION THE FLOOR AREA, ACCORDING TO THE SAID SECTIONAL PLAN, IS 523 (FIVE HUNDRED AND TWENTY THREE) SQUARE METERS 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 BY DEED OF TRANSFER NUMBER ST44061/2017

3. The Registrar of the Gauteng Local Division, Johannesburg is authorised to issue a warrant of execution against the immovable property referred to in paragraph 2 above.


R M KEIGHTLEY

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date Heard (by videolink)	: 23 April 2020
Date of Judgment	: 10 May 2020
Counsel for the applicant	: JM Hoffman
Instructed by	: Swartz Weil Van der Merwe Greenberg Inc
Counsel for respondent	: M Kufa; M Moropene
Instructed by	: Machaba Attorneys
Counsel for Mr Greenberg	: L Hollander