

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH**

Case no: 1810/12
Date Heard: 28/02/2013
Date Delivered: 04/04/2013

In the matter between:

CHANGING TIDES 17 (PTY) LTD N.O

APPLICANT/PLAINTIFF

And

**JOHN MARK RUITERS
ID NO.**

1st RESPONDENT/DEFENDANT

**PRISCILLA BERTHA RUITERS
ID NO.**

2nd RESPONDENT/DEFENDANT

(Married in community of property to each other)

JUDGMENT

SMITH J:

[1] The plaintiff instituted action against the defendants for: payment of the sum of R376 526. 91; an order declaring the defendants' immovable property executable; and other ancillary relief.

[2] The defendants failed to enter appearance to defend within the prescribed time limit and the plaintiff consequently applied for default judgment. However, instead of filing a written application for default judgment with the registrar (as it was required to do in terms of Rule 31(5)(a) of the Uniform Rules of Court), the plaintiff elected to bring the application on notice of motion in terms of Uniform Court Rule 6(5). The notice of motion thus called upon the defendants to, *inter*

alia: appoint an address for service in terms of Rule 6(5)(b); notify the plaintiff of their intention to oppose the application within five days; and file an answering affidavit, if any, within 15 days.

[3] At the hearing of the matter I raised with *Mr Scott*, who appeared for the plaintiff, the issue as to whether the matter was properly before me in the light of the plaintiff's failure to follow the procedure prescribed in terms of Rule 31(5)(a).

That rule 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:..."

[4] *Mr Scott* argued that even though the procedure adopted by the plaintiff does not accord with the provisions of Rule 31, it is nevertheless a salutary one, because it allows a defendant the opportunity to place facts before the court which may be relevant to the exercise of its discretion to declare immovable property executable. Unfortunately the defendants appeared in person and were therefore understandably unable to make any legal submissions in this regard.

[5] In **Lindeijer and Another NNO v Butler SA 2010 (3) 349**, Jones J held that the provisions of Rule 31(5)(a) are peremptory and that a court may only hear an application for default judgment in respect of a debt or liquidated demand in default of a notice of intention to defend or a plea if:

(i) it is referred by the Registrar in terms of Rule 31(5)(b)(vi); or

- (ii) it is set down in the High Court for consideration in terms of Rule 31(5)(d) by a plaintiff dissatisfied with the decision of, or the directions given by the Registrar.

[6] Apart from the fact that I consider myself bound by the **Lindeijer** decision (supra), I am in respectful agreement with the line of reasoning adopted by the learned judge. I am therefore of the view that the matter is not properly before me.

[7] Moreover, I am also not convinced that the procedure prescribed in terms of Rule 31(5) precludes a defendant from placing relevant facts before the court hearing the application for default judgment. The defendants would have been alerted to their statutory rights in the notice in terms of s.129 of the National Credit Act, 34 of 2005, and in the plaintiff's summons. In addition, Practice Rule 14A now prescribes the procedure to be followed in applications for default judgment where a creditor seeks an order declaring immovable property executable, as well as the contents of the affidavit accompanying that application. In the event, where an order is sought to declare a debtor's immovable property executable, the registrar must refer the entire application for default judgment for hearing in open court. (*Gundwana v Steko Development and Others 2011 (3) SA 608 (CC)*).

[8] I am accordingly of the view that the plaintiff's failure to file a written request for default judgment with the registrar in terms of Uniform Court Rule 31(5)(a) and Practice Rule 14A, means that the matter is not properly before me. In the result

the matter is removed from the roll and the plaintiff is given leave to set it down in terms of Rule 31(5)(a), after notice to the defendants.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearance

Counsel for the Plaintiff	:	Advocate Scott, SC
Attorney for the Plaintiff	:	Velile Tinto Associates Inc. C/o Jaque Du Preez Attorneys 99 Mangold Street Newton Park Port Elizabeth Tel: 041 365 2232/ 39 Ref: J Du Preez /tl/6764
Appearance for the Defendants	:	In person
Date Heard	:	28 February 2013
Date Delivered	:	04 April 2013