

**HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No.: 42355/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

SIGNATURE 29/01/2024

DATE

In the application between:

ACTOM ELECTRICAL

PRODUCTS

Applicant

(A DIVISION OF ACTOM (PTY) LTD)

and

MOHLOMI MAKGOAHLENG

MATLALA

Respondent

In Re:

ACTOM ELECTRICAL

PRODUCTS

Plaintiff

(A DIVISION OF ACTOM (PTY) LTD)

And

CHICHI GROUP (PTY) LTD

First Defendant

MOHLOMI MAKGOAHLENG

MATLALA

Defendant

Second

NKWANE ARIEL MAHLATJI

Third Defendant

ABRAM NKOPODI MASHABELA

Fourth Defendant

JUDGMENT

NHARMURAVATE AJ:

Introduction

[1] This is an application in terms of Rule 46(1)(a) and rule 46A of the uniformed rules of court wherein the Applicant seeks an order declaring the immovable property of the Respondent specially executable. This application is different in that the Applicant herein is not a Bank or a financial institution as per the norm and it stems from a judgement obtained by default on the 20th of January 2021, wherein the Applicant obtained judgement against the Respondent who in the main action was both the First and Second Defendant.

[2] The order granted was as follows that:

“1.1 Payment in the sum of R 3 345 296.80

1.2 Interest on the aforesaid sum at a rate of 3% above the prime interest rate being quoted by Nedbank (a division of Nedcor Bank LTD) as that at which it is prepared to lend on an overdraft to its most favoured corporate customers in the private sector in the Republic of South Africa per annum, calculated from date of default to date of final payment; and

1.3 Costs on attorney and own client, to be taxed.”

- [3] There has been non-compliance with the court order issued in January 2021 from the Respondent. The Applicant now seeks to execute against his residential property in accordance with rule 46 as it is his primary place of residence. This application is opposed by the Respondent. In opposition he filed the required answer and subsequently filed a supplementary affidavit on Friday the 10th of November 2023. The Respondent sought leave from the court to admit the further answering affidavit filed since this was filed at a very late stage. This was not opposed by the Applicants as it did not cause any prejudice and the Applicant's did not see the need to replicate to the supplementary answer consequently filed.
- [4] Further, the Respondent has raised a point in *limine lis pendence* which this court had to determine before the main matter was argued.

LIS PENDENSE

- [5] The Respondent raised a point in *limine of lis pendence* in that the hearing of the rule 46 application could not continue as there was a pending application before this court. The Respondents Counsel submitted that the application was filed on the 19th of August 2021 which sought a declaration that: the Registrar's order was ambiguous and or unclear as to whom the order was enforceable against. Further, that application sought to nullify the writ of execution which had been issued pursuant to the order.
- [6] The Counsel for the Applicant argued that there was no pending application as it had been dismissed by the Honourable Mggibisi Thusi J's order. The Respondent in the declaratory application was *dominus litus* they had to ensure that the matter was seen up to its end. However, this was not the case, the Respondent only filed this application subsequent to that the Applicants filed answering papers. Thereafter there was no reply filed nor any heads of argument filed by the Respondent. The matter was thereafter laid dormant. Seeing that the matter was unattended which was causing prejudice to the Applicant, the Applicant decided to take the initiative by obtaining an order on

the 1st of April 2022 which directed that the Respondent must file heads of argument within 10 days failing which the respondent's application dated the 19th of August 2021 would be dismissed. The Respondents were directed to pay the costs of the application to compel filing of heads. The Respondents failed to comply with the court order which subsequently dismissed the declarator application.

- [7] In reply to the Respondent's Counsel argued that the Respondent did not have finances to continue with the matter hence their disappearance or inactivity with the application filed in court.
- [8] In my opinion, the *point in limine* raised is *mala fide*. The Respondents has always known that there was a default judgement order against him and that this court order needs to be complied with. There was no appeal filed or review at this instance. In this regard the default judgment order remains binding on the parties which were cited on it. The Respondent did not deny having knowledge of the Mgqibisi Thusi J order which was accordingly served on him which dismissed the declaratory application due to his failure to file heads of argument. It is therefore misleading the court to argue *lis pendence* as there is no pending declaratory application as this was dismissed by the Mgqibisi Thusi J order in April 2022. It would seem that this application was filed with the purpose pf delaying and or frustrating the Applicant without a just cause.
- [9] Even after receipt of the compel order the Respondent did not communicate anything further to the Applicants be it the difficulty with finances which is now being argued by Counsel for the Respondents from the bar. There is no pending rescission of this court order dated the 1st of April 2022 by Mgqibisi Thusi J therefore the argument raised has no merit in law.
- [10] Therefore, the point *in limine* raised by the Respondent is dismissed.

ISSUES TO BE DETERMINED

[11] The parties compiled a long list of determinations which have to be made by this court. In my view the following were more important that is:

11.1 Whether the court order relied upon by the Applicant for the execution against the Respondent's residence is enforceable against the Respondent since he is not identified therein as the judgement debtor.

11.2 In the event that the court order is found to be enforceable: Whether the matter can be adjudicated at all given the applicants non-compliance with Rule 4(A)(5)(a) in that it did not place an evaluation of the market value of the property before court as required.

11.3 Whether or not the Respondent's primary residence ought to be declared executable given his circumstances as per the supplementary answering filed.

ARGUMENTS BY PARTIES

[12] This court directed the Respondent to pay an amount of R3 345 296.80 to the Applicant. This order was obtained by default thereafter it was served accordingly to all the parties which were cited. As discussed in the preceding paragraphs this order still remains as it has not been set aside in any manner whatsoever be it through an appeal or review.

[13] The Applicants Counsel argued that the first defendant in the main action Chichi Group Pty Ltd is the Respondent and currently it has been placed under voluntary liquidation. In attempts to satisfy the court order a Sheriff was sent to execute the order on the 22 April 2021, by attaching the Respondent's movable property at his residence. The sheriff attended to removal of the attached goods except for the Respondent's vehicles. The sheriff then sold the goods and only recovered an amount of R 12 759.33 (twelve thousand, seven hundred and fifty-nine Rand and thirty-three Cents) from the sale in execution of the respondent's movable property. There were no sufficient assets to satisfy the default judgment order.

- [14] The Applicant's Counsel argued that the Applicant will only be able to recover the judgment debt by attaching and selling the immovable property, which is owned by the Respondent situated at ERF 2[...], K[...] G[...] extension 19, Pretoria be declared specially executable.
- [15] On the other hand, the Respondent argued that the court order that the Applicant sought to rely on did not make sense, for a court order to be enforceable it must be clear and unambiguous¹. The Respondent was using the property as his primary residence where he lived with his ill father, three minor children and his partner. The Respondent's Father had suffered a heart attack and a stroke and was undergoing home treatment by a Doctor and a Physio Therapist 5 days a week. Additionally, the Applicant had failed to comply with the requirements of Rule 46(A)(5)(a). In that the application must be accompanied by a valuation of the market value of the property. In terms of Rule 46(A)(2)(b) the court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.
- [16] The Respondent further argued that he is indigent and the sale in execution will not be of any benefit to the Applicant as there will be no free residue after the secured creditors being the municipality and the bank ABSA have been paid as he still has a home loan with ABSA.
- [17] The Applicant in reply argued that the Respondent was not an indigent individual and is financially able to afford to purchase another immovable property should this immovable property be declared specially executable. The Applicant was able to produce documentary evidence proving that the Respondent is at least a Director in various entities through proof of the ACI PC directorship. The Respondent owned two motor vehicles with a combined value

¹ Lujabe v Maruatona (35730/12)[2013} ZAGP JHC 66 (15 April 2013) at par 17

in excess of R 2 000 000, 00 [Two million Rands]. The sheriff was unable to attach, remove and sell these vehicles by way of sale in execution as the Respondent claims that the vehicles are still under finance by a financial institution.

[18] In support of the above contention the Applicants argued that the Respondent purchased the immovable property in 2019 for R 3 200 000,00 [three million, two hundred thousand rands] and would reasonably be paying approximately R 23,000, 00 (twenty-three thousand Rand) per month towards his mortgage bond with Absa bank. This was indicative that the respondent was far from being an indigent person.

[19] Further, there was no possibility that the Respondent's liabilities to the Applicant may be liquidated within a reasonable time, without having to execute against the Respondent's residents. The immovable property which is sought to be declared executable was not acquired by means or with assistance of a state subsidy. The debt which is sought to be enforced was not incurred in order to acquire the immovable property sought to be declared executable.

ANALYSIS OF THE MATTER

[20] The first issue which this court called upon to determine is whether the court order relied upon by the Applicant for the execution against the Respondent's residence is enforceable against the Respondent since he is not identified therein as the judgement debtor.

[21] It is important to firstly point out that this court order is still in existence. The constitution calls upon all parties to obey court orders. Section 165(5)² directs that an order or a decision issued by a court is binding to all persons to whom it applies. Barring an appeal against this court order, the court order of the 26th of January 2021 remains binding to the Respondent. It is common cause that there is no appeal pending or any other application pending before this court in

² The Constitution Act 104 of 1996

relation to this matter. This court was not ceased with an appeal or review of the main matter that resulted into this order. Any attempt in assessing or pronouncing on this court order will be irrational.

[22] In my opinion the Respondent is clearly identified in the court order of January 2021. In fact, even the Respondent in this application is not disputing his identity in this court order. Alternatively, the Respondent is not even disputing the debt that is owed to the Applicant. This order remains enforceable to the Respondent more so because the Respondent has absolved the third and fourth defendants in the main action from any liability that arises as a result of debts incurred by the first defendant. The Respondent has acknowledged that he is solely liable for the debts owing to the creditors which include the Applicant in a resolution that was passed by the Board of Directors of the first defendants in the main action.

[23] The uniformed rules of the court provide procedures to be followed by a party who is aggrieved with a court order or a judgment. None of those procedures were perused by the Respondent for this court to be able to make such a consideration. This court order cannot be revisited by a court sitting as a motion court hearing a rule 46 application. In line with the resolution dated the 24th of January 2020 the Respondent is liable, and the court order is enforceable against him. Therefore, there is no confusion as to who must make such payment in that regard.

[24] The second issue for determination is *whether this matter can be adjudicated given the Applicants non-compliance with Rule 4(A)(5)(a) in that it did not place an evaluation of the market value of the property before court as required. (sic)*

[25] In terms of Rule 46A(2)(a): A court considering an application under this rule must–

“(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor [...].”

Rule 46A(2)(b) especially provides that: “A court shall not authorise execution against immovable property which is the primary residence of a judgment

debtor unless the court, having considered all property is warranted.” relevant factors, considers that execution against such.

- [26] Rule 46A seeks to protect homeowners by ensuring that their homes are not sold in execution for prices which are not market related. Courts are called upon to take account of the market value of the property, making a fair determination of what a fair reserved price would be. It is therefore a requirement for an applicant to have a sworn independent evaluation certificate by a property evaluator which in this instance the Applicant does not have.
- [27] It is important for the court to be able to establish the true market value of the property as a starting point before an attachment can be ordered to the property. Compliance with the rule is of outmost importance keeping in mind section 26 of the Constitution³. The requirements for rule 46 in this regard are set in stone and they have been pronounced upon in several important cases. Therefore, this non-compliance equates to the Applicant being unsuccessful with the execution at this stage.
- [28] In *Jaftha v Schoeman*⁴, Mokgoro J in the Constitutional Court found that in a *matter where execution is sought against property which is the primary residence of a judgment debtor a court must consider whether the rules of court have been complied with; whether there are alternative ways of recovering the judgement debt; further take into account, among other things, the circumstances in which the judgement debt was incurred; attempts made to pay off the debt; the financial position of the parties; the amount of the judgement debt; whether the judgement debtor is employed or has a source of income to pay off the debt; and other factors relevant to this case.*
- [29] The Respondent's answer is also not satisfactory inclusive of the supplementary answer. The Respondent has not attached any proof of how much he is currently owing to the municipality the only attachment that has

³ Everyone has a right to have access to adequate housing.(2) The state must take reasonable legislative and other measures,within its available resources, to achieve the progressive realisation of this right.

⁴ 2005 (2) SA 140 (CC)

been annexed from the City of Johannesburg dates back to February 2023 whereas the application was heard in November 2023. It was imperative upon the Respondent to attach recent statements in their supplementary answer which was filed on the 10th of November 2023 in support of their argument.

[30] Further, the Respondent has attached documentation which he purports to be proof of how much he owes under his home loan with Absa. However, the statements which have been attached are for a current account overdraft which the Respondent is able to pay for. In terms of these statements, he has not defaulted in paying for this overdraft. There is no satisfactory documentation that indeed he has a bond registered with ABSA except for the argument made from the Bar. In my opinion the plea of the Respondent being indigent is not supported in this application by any documentary evidence. The Respondent has not even attached a single financial report or audited statements to prove that the various companies he enjoys directorship in are dormant or are in financial destitute.

[31] Courts are enjoined to ensure that the rights of all litigants in such matters are balanced fairly special parties with a direct interest. It is of importance that the court before it makes its determination in such applications that it has proper knowledge of how much the bond was initially and the current outstanding balance thereof from the bond originator which in this instance is Absa. It is improbable for this court to order foreclosure on the respondent's property without this information as it is vital and it will also assists in being able to formulate a reserved price where needs be.

[32] Hence, it is my opinion that Absa bank should have been joined in these proceedings as a party with a direct interest in the matter. This would have made the transition for the Applicants easier that is in obtaining documents pertaining to the home loan so that there is compliance with the requirements of rule 46A. If ABSA is a bond originator of the property that the Applicant seeks to attach at this stage, then the property in issue cannot be attached without them having knowledge of this application as they are the preferential creditor.

The bank currently has a real right enforceable against third parties over this property if indeed there is a home loan with ABSA.

[33] The underlying principle emphasized here is that execution against immovable property which is the primary residence of the judgment debtor requires judicial oversight – the aim of which is to give effect to section 26 of the Constitution which is to protect the right to adequate housing and security of tenure. Tritely, *“the need for judicial oversight in such applications and the reasons therefore have been the subject matter of a number of court applications in the Supreme Court of Appeal, Constitutional Court and individual divisions of the High Courts”*⁴

[34] In *Gundwana v Steko Development and Other*, the Constitutional Court clarified that the *Jaftha* decision applies not only in exceptional cases but also in typical mortgage foreclosure cases brought before the high court⁵. However, this does not imply that a judgment creditor's right should be unduly restricted by a Rule 46A defence claim. In *Absa v Mokebe* the court referred to the authors of Wille, who stated thus: *“The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have the property sold and obtain payment of is debt out of the proceeds of sale.”*⁶

[35] The Supreme Court of Appeal in *Petrus Johannes Bestbier and Others v Nedbank Limited*⁷ cited with approval, the decision in *Jaftha* and stated that: *“The text of rule 46A(1) reveals that the rule applies whenever an execution creditor seeks to execute against residential immovable property of a judgment an application in debtor's immovable debtor. Notably, rule 46A(2) provides that a court considering which a creditor seeks to execute against the judgment property must consider various matters.”*

⁵ 2011(3) SA 608 (CC)

⁶ 2018(6) SA 492 (GJ) (12 September 2018)

⁷ 2023 (4) SA 25 (SCA) (13 June 2022)

[36] Rule 46A seeks to provide protection to all individuals who are in the process of having their properties declared specially executable this gives effect to section 26 of the Constitution. Compliance with rule 46A cannot be relaxed at the instance of the Applicant simply because they are armed with a default order against the Respondents. The protection provided by rule 46A is objective and applies equally. Compliance in this regard is key.

COSTS

[37] Tritely, costs follow the results. However, courts are within the court's discretion in this application both parties at fault in one way or the other. The Respondent raised their point *in limine* which was not *bona fide* which were subsequently dismissed. Additionally, the Respondent filed its supplementary answering affidavit without first seeking leave to do so before this court. In addition to that the supplementary answering affidavit was only filed on a Friday the 10th of November whereas the matter had been set down for hearing in the week of the 13th of November 2023 which in my opinion amounts to ambushing the Applicant.

[38] On the other hand, the Applicant has not complied with the requirements of rule 46A in full as discussed. Even the notice of motion for the Applicant is incomplete, I could not see the prayers sought. In light of the foregoing, I cannot order any party to pay costs in this regard.

[39] In the circumstances the following order is made:

1. The application is dismissed for non-compliance with the requirements of rule 46A.
2. Each party to pay its own costs.

NHARMURAVATE AJ
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 16/11/2023

Judgment delivered: 29/01/2024

APPEARANCES:

Counsel for the Applicant Adv C Opperman

Attorneys for Applicant Vasco De Oliveira Inc

Counsel for Respondent Adv WB Boonzaaier

Attorneys Respondent Mashabane & associate Inc
