REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: **86467/2020**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 16 September 2022

In the matter between:

ELDO VILLAGE HOME OWNERS ASSOCIATION (NPC) Applicant

and

PFANANI PHANUEL MAKUYA Respondent

REASONS

DE VOS AJ

[1] This is an application in terms of section 46A of the Uniform Rules of Court to declare the respondent's primary residence specially executable. The case turns on Rule 46A(2)(a)(ii) which provide that a court considering such an application must consider

"alternate means" by the judgment debtor of satisfying the judgment debt other than execution against the judgment debtor's primary residence.

[2] On 24 August 2022 this Court granted an order that –

a) The application is postponed sine die;

b) The respondent is to provide the applicant with items 9 – 11 as set out in the document that commences at CaseLines A 325 and runs to A 327;

c) The applicant is to provide the respondent with an occupation certificate within a week from the documents in paragraph (b) being provided to the respondent; and

d) Each party to pay their own costs.

[3] I set out the reasons for this order below.

[4] The respondent's home is situated in the scheme knows as the Eldo Village Home Owner's Association. The respondent is subject to the rules of the applicant, which includes the imposition of levies and penalties for failure to comply with the applicant's rules and regulations. The applicant has, over the years, imposed levies and penalties on the respondent. The respondent has been unable to pay the levies and penalties. The amount owed has grown considerably over the past 7 years.

[5] The applicant obtained a judgment for the outstanding levies and penalties. The respondent has not been able to satisfy this judgment debt, an attempt to execute against his movables were unsuccessful and his indebtedness to the applicant is not in dispute.[1]

[6] The parties came before this Court on 2 August 2022. The matter was not ready to proceed. The respondent had uploaded certain emails onto caselines the day before the hearing. The parties were in agreement that the information contained in the emails were relevant to the application and would be best placed before the Court in the form of affidavits. The Court postponed the matter to ensure all relevant information was before the Court. In doing so the Court was mindful of its obligation

[1] In September 2021 the parties entered into a settlement agreement which was made an order of Court. In terms of the settlement agreement the respondent was to make certain lump payments and then monthly instalments towards settling the debt. Since September 2021 the respondent has failed to comply with the settlement agreement. The settlement agreements permits the home owners association to claim the whole outstanding amount in the event that the respondent does not comply with the agreement. The home owners association seeks to enforce this acceleration clause.

to consider all relevant circumstances as mandated by section 26(3) of the Constitution and Rule 46A. As losing one's home engages section 26(3) of the Constitution a Court may only grant an order that may lead to a person's eviction after considering all relevant circumstances. The duty on the Court is echoed in the wording of Rule 46A(2)(b) of the Uniform Rules of Court that provide 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 relevant factors, considers that execution against such property is warranted". In these circumstances, the parties agreed on timeframes and the matter was postponed to 18 August 2022 to ensure the necessary information would be properly placed before the Court.

[7] When the matter came before the Court again on 18 August 2022 the landscape of the case had changed considerably. Firstly, the respondent had sold his car which allowed him to pay off a considerable chunk of the debt owed to the applicant. Secondly, the respondent indicated that he wished to sell the house and to use the proceeds of the sale, in part, to make good on his debt to the applicant. However, in order to do so he required a certificate of occupancy from the applicant. The applicant, in turn indicated that it could not issue the certificate without being placed in possession of certain documents in the respondent's possession. Counsel for the respondent indicated that the bulk of the documents had been sent through the morning of the hearing and undertook that the remainder would be sent during the course of the day. The outstanding documents were identified and listed for the Court's benefit.

[8] Rule 46A specifically mandates a court to consider "alternative means" of satisfying the judgment debt other than execution against a primary residence. In this case, there was an alternative means of satisfying debt presented to the Court: the respondent's willingness to sell his home.

[9] It is submitted that such alternative means is a relevant factor to be considered by a court under subrule (2)(b) of Uniform Rule 46A in determining whether execution against the primary residence of the judgment debtor is warranted. In *Absa Bank Ltd v Njolomba and Other Cases*[2] Fisher J stated:

[2] 2018 (5) SA 548 (GJ) at 550E

> ‘There have, of late, been salutary moves in the statutes, case law, rules, and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules which requires that the court “*consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor’s primary residence.*” The cases have required stringent adherence to notice and service requirements and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to rule 46 [*sic*] of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor’s circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and the [*sic*] rehabilitate the debtor if at all possible.

[10] This Court is empowered, where it considers it in the interest of justice, to postpone the money judgment together with the order for special execution.[3] The Court considers it in the interest of justice to postpone the judgment as the respondent has presented an alternative means of enforcing the debt. The respondent has also indicated a willingness to pay the debt by selling his motor vehicle and making a bulk payment to the applicant. It also weighs with the Court that in light of the clear solution provided by the respondent, an order for execution of the home would not be proportionate. Lastly, the respondent is more likely to achieve a market related price for the sale of his home on the open market, rather than through a forced sale triggered by Rule 46A.

[11] As to costs, the applicant has not been successful in its application and is therefore not entitled to its costs. Whilst it has achieved a measure of success in ensuring that, practically, the judgment debt would be paid it is not clear why the exchange of documents necessary to obtain the occupancy certificate had to be solved at the

[3] Absa Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ) at 637A–E

doors of court and could not have been addressed prior to approaching the Court. In these circumstances the Court is disinclined to grant costs.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	**ADV CJS KOCK**
Instructed by:	Pretorius Le Roux Inc
Counsel for the Respondent:	**ADV NM SELESO**
Instructed by:	JL RAPHIRI ATTORNEYS INC
Date of the hearing:	2 and 18 August 2022
Date of judgment:	16 September 2022