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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2894/2020

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| (1) | REPORTABLE: Yes ☐ / No ☒ |
| (2) | OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒ |
| (3) | REVISED: Yes ☐ / No ☒ |

Date: 05 July 2024

WJ du Plessis

In the matter between:

CHANGING TIDES 17 (PROPRIETY) LIMITED N.O.

APPLICANT

And

KOWLASER, NAVINE

FIRST RESPONDENT

SECOND RESPONDENT

KOWLASER, SHANEETHA

in re:

CHANGING TIDES 17 (PROPRIETY) LIMITED N.O.

PLAINTIFF

And

KOWLASER, NAVINE

FIRST DEFENDANT

KOWLASER, SHANEETHA

SECOND DEFENDANT

JUDGMENT

DU PLESSIS AJ

[1] This is an application for default judgment in terms of Rule 31 and an opposed application in terms of R46A to declare the defendants' immovable property specially executable. The Applicant is cited in its capacity as the sole trustee of the South African Home Loans Guarantee Trust ("the Trust"). The first and second Respondents ("the Kowlasers") are the registered owners of certain immovable property they occupy as a primary residence. Two mortgage bonds are registered against the property in favour of the Trust. No payments have been made since 12 November 2019. The Trust seeks execution for R884 917,66 (the total outstanding amount) plus interest, and it seeks to execute against and foreclose the Kowlasers' property with mortgage bonds registered against it in favour of the Trust.

[2] The Trust instituted action against the Kowlasers on 31 January 2020. They entered an appearance to defend. After the Trust served a notice of bar, the then attorneys of the Kowlasers sent a written proposal to the Trust, proposing to delay the matter and offering that the Kowlasers would continue to pay R10 000 per month in respect of the home loan. The period of the bar was extended. However, the Trust did not accept the payment arrangement and would only continue if the Kowlasers paid the normal monthly instalment and an additional monthly amount to liquidate the arrears. The property was to be put on the market at the same time. This offer was left unanswered, and the Trust informed the Kowlasers that they would apply for default judgment and an R46A application, which they then did.

[3] The Kowlasers state in their answering affidavit that there are less invasive means to satisfy the arrears. The Respondents hoped that a living annuity payment (the annuity

is worth R721 797,26) would enable them to rehabilitate the Loan Agreement. Mr Knowlaser is also optimistic about his employment prospects post-COVID, enabling him to pay monthly instalments. They argue that they are not recalcitrant debtors – it is merely due to certain circumstances that they struggle to meet their obligations. They are trying to change these circumstances for the better to honour their obligations again.

[4] The property is the primary residence of the Kowlasers, who also occupy it with their two adult sons, one of whom is dependent on them. They will suffer prejudice if they have to let go of a home they have paid off for thirteen years, a home that gives them a sense of security and anchors them in a community. This while they are willing, but unable at the moment, to service the debt. They do have plans to be able to pay again, but they need time to realise them.

[5] Their attorneys have approached the Trust's attorneys to find a solution. Once their lives are back on track and they honour their payments, the Trust's risk is significantly reduced. All this was the situation in September 2021 when the answering affidavit was signed.

[6] On 19 April 2023, a written agreement was made an order of court. In terms of this agreement, the Kowlasers would sell their house or rehabilitate the loan agreement for three months. While trying to sell the house, they will pay a monthly amount of R6 600. The Trust, in turn, will suspend the action for three months to enable them to do this. The agreement stipulated that should the Kowlasers not keep their end of the bargain, the Trust may proceed to take action against them. The Kowlasers did not manage to sell the house. The Trust thus instituted these proceedings.

[7] During the hearing Mr Kowlaser represented the defendants and stated that they now receive a monthly withdrawal from the Allan Grey annuity, the house is in the market, and they are waiting for an offer. They tried to transfer the bond, but there was a "poor payer" bar on it. He is still trying to find work. He states that the house's market value in April 2023 is R1 400,000.

[8] On 12 November 2019, the arrears were R77 758,47. In April 2022, it was R468 339,64. The problem, the Trust states, is that the retirement annuity pays out only 17,5%, which is already 68% of the value of the Allan Gray Living Annuity. Thus, even if the Kowlasers had the annuity paid out, it would not cover the arrears. The current annuity monthly pay-out is about a third of what is needed to service the monthly instalment. The consent order was made to enable them to sell the house, which they still have not managed to do.

[9] The Trust states that the prejudice it will suffer if the property is not sold relates to an increased indebtedness of the Kowlasers that the selling of the property will no longer be able to satisfy and that the security for the Trust's loan will be compromised. There is also concern that the municipal arrears will grow, further impacting the amount the Trust can recover. As the arrears escalate, the asset's value might no longer be able to satisfy the debt. It is a downward spiral. The Trust should, therefore, succeed in their R46A application.

[10] The Trust makes the following suggestion for a reserve price in the initial founding affidavit:

Forced sale value as per valuation report	R 1 000 000
Outstanding municipal charges due to the local authority	R 10 161
Auctioneer charges based on forced sale.	R 29 325
Transfer costs	R 27 933
The provisional estimate of the electrical compliance certificate	R 5 000
Contingency (15% of forced sale)	R 150 000
Reserve price suggestion	R 777 580

[11] The new forced sale value presented at the hearing was R 900 000 (with a market value still at R1 280 000). This was not a sworn valuation. The municipal value is R1 300 000. The outstanding municipal charges are R 12 013. The Trust suggested a "palatable reserve price" of R 690 000 that is not too high or too low, based on the same calculation presented above except for the changed forced sale value.

The law

[12] Rule 46A applies to instances where an execution creditor seeks to execute against the residential property of a judgment debtor. When adjudicating on an application in terms of rule 46A, the court must determine whether the property is the primary residence of the judgment debtor, which it is in this case, and whether the judgment debtor can offer alternative means to service the debt,¹ which is a question in this case. This is because a sale in execution of a home can only be justified in terms of the Constitution if it is the last resort to satisfy a debt.² The court should only declare the property executable if there is no other way to service the debt. Whichever way, when the court adjudicates on rule 46A applications, it must balance the rights and interests of the execution creditor, the judgment debtor and any other affected parties (such as the local authority).

[13] Decisions to declare primary residences of debtors who have fallen on hard times weigh heavily on the court. This is also so because foreclosure of the primary residence of a judgment debtor impacts their Constitutional right to access adequate housing. This is why the courts' oversight is important – to ensure that the execution is not disproportionate, weighing up the purpose of the execution (a means used in the execution process to exact payment of the judgment debt) and the debtor's constitutional rights.

[14] Other than selling the property themselves, it seems there are no reasonable ways to pay the debt due to the Kowlasers' circumstances. With the efflux of time and the non-payment of the arrears, there is a rising disproportionality between the consequences of the execution and its purpose.

¹ Rule 46A(2)(a)(ii). See for instance *Absa Bank Limited v Njolomba* [2018] ZAGPJHC 94.

² Rule 46A(8)(d).

[15] The order by consent more than a year ago hoped that the Kowlasers' plan would be realised to avoid the sale in execution. This did not realise. Up to this hearing, a year later, the Kowlasers had the opportunity to pay the overdue amount and the reasonable costs of enforcing the agreement until the default charges were remedied to avoid foreclosure.³ This also did not happen. During this hearing, the trust agreed to suspend the execution of the order for three months, and should their plans be realised before the foreclosure, they can still stop the sale in execution.

[16] In these circumstances, the application in terms of rule 46A should be granted. To alleviate some of the hardship that the Kowlasers might endure, I will set the reserve price by considering the market value, the municipal value, the outstanding amount for the municipal charges and the so-called contingency and other fees that go with a sale in execution. I do this by utilising the so-called "Opperman" method – adding the municipal value with the market value, dividing it by two and subtracting the outstanding rates and taxes – which renders an amount of R903 000. In line with the practice in this court, this seems to be a reasonable reserve price.

[17] The Kowlasers have been informed that they can still try to sell the house or pay the arrears to reinstate the agreements and avoid foreclosure.

Order

[18] I, therefore, make the following order:

1. The First and Second Defendant make payment (jointly and severally, the one paying the other to be absolved) of:
 - a. The sum of R884 917,66;
 - b. Interest in the sum of R406 897,63 (being the balance of the interest calculated on the capital balance outstanding from time to time at the rate of

³ *Absa Bank Limited v Njolomba* [2018] ZAGPJHC 94.

10,50% per annum, compounded monthly in arrear from 12th day of November 2019 to the 1st day of March 2024 after deducting payments made during that period);

c. Interest on the sum of R1 291 815,29 (being the outstanding capital of R884 917,66 together with the accrued interest of R406 897,63) calculated at the rate of 10,50% per annum, compounded monthly in arrear from the 2nd day of March 2024 to date of final payment.

2. The immovable property known as Erf 6[...] N[...] Park extension [...] Township, Registration Division I.R., Province of Gauteng and held by Deed of Transfer T50054/2007 and situated at 1[...] Q[...] V[...] d[...] W[...]t Avenue, N[...] Park Extension [...], K[...] Park, Gauteng ("the property") is declared specially executable.

3. The reserve price for the sale in execution of the immovable property is R903 000,00. If the reserve price is not met, the Sheriff of this Court or his lawful Deputy is authorised and mandated to sell the immovable property at the open market amount bid by the highest bidder, such sale being subject to confirmation by this Court.

4. The Registrar of the Court is directed to issue a warrant of execution to enable the Sheriff to attach the property to satisfy the judgment debt, interest and costs.

5. The Sheriff of this court or his lawfully appointed Deputy is authorised to sell the property in execution.

6. The First and Second Defendant are to pay:

- a. Costs of suit (jointly and severally, the one paying the other to be absolved);
- b. The costs of this application (jointly and severally, the one paying the other to be absolved).

7. The order is suspended for 3 months from handing down this judgment.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

Counsel for the applicant:

Mr A Pullinger

Instructed by:

Moodie & Robertson

Counsel for the respondent:

Mr Kowlaser

Date of the hearing:

23 May 2024

Date of judgment:

04 July 2024