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**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: 804/2018

In the matter between:

SHACKLETON CREDIT MANAGEMENT PTY LTD Applicant

and

SAMUEL MATLABE TSHABALALA First Respondent

ABSA BANK LIMITED Second Respondent¹

STANDARD BANK OF SA LIMITED Third
Respondent

MANGAUNG METROPOLITAN MUNICIPALITY Fourth Respondent

Coram: Opperman J

Heard: 25 July 2024

Delivered: 15 November 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 15 November 2024. The date and time of hand-down is deemed to be 15h00 on 15 November 2024

Summary: In limine – non-joinder – rule 46A(3)(b)

ORDER

¹ The second, third and fourth respondents did not join the litigation in this application.

1. The non-compliance with the court order dated 25 April 2024 pertaining to the late filing of the answering affidavit by the first respondent, Samuel Matlabe Tshabalala, is condoned. The costs of the condonation application to be carried as per party and party scale B by the said first respondent, Samuel Matlabe Tshabalala.
2. The point in limine as raised by the first respondent on the issue of joinder succeeds and the applicant is granted leave to join the Registrar of Deeds and Herholdts Lighting Division (Pty) Ltd as interested parties to these proceedings. Costs are reserved on this issue in limine.
3. The matter is to be enrolled on the opposed roll for argument on the further points in limine on the 'unilateral variation of a court order', 'failure to comply with rule 46A', if still persisted with by the first respondent, and the merits of the application by the applicant.

JUDGMENT

Opperman J

[1] The case turns, in its essence, on action that was instituted by the applicant against the first respondent claiming for R408 288.80 being contractual damages suffered by the cedent pursuant to a vehicle finance agreement entered into between the first respondent and the cedent for the purchase of a Mercedes Benz G63 AMG.

[2] On the 30th of July 2020 judgment was obtained by default against the first respondent for:

- 'a. payment of the sum of R408 288.80.
- b. Payment of costs of the suit.'

[3] On the 4th of October 2022, the applicant concluded a written agreement of cession with the third respondent Standard Bank South Africa. In terms of the cession, the cedent unconditionally and irrevocably ceded and made over to the applicant, with effect from 16 July 2022, all rights, titles and interest in and to the 'Book Debts' listed in the schedule to the cession. The 'Book Debts' were defined to include all security associated with such debts and all judgment and all claims against any third parties for, or in relation to, such debts.

[4] The applicant thus took the right to enforce the order dated 30 July 2020 against the first respondent, Samuel Matlabe Tshabalala. By the time that the order was obtained there was compliance with the legislatively prescribed prerequisites in terms of the National Credit Act 34 of 2005. The order could not have been granted otherwise.

[5] The main application here is for the following:

'1. Declaring executable the First Respondent's immovable properties: -

1.1 Erf 1[...] Waverly Bloemfontein

Registration Division: Bloemfontein RD

Province of the Free State

Measuring 1338 square meters

Held by Deed of Transfer T45[...]

Situated at [...] M[...] R[...], Waverly

1.2 Portion 2, Holding 1[...], L[...] Small Holdings

Registration Division: Bloemfontein RD

Province of the Free State

Measuring 1.1148 square meters

Held by Deed of Transfer T37[...]

Situated at 1[...] L[...] E[...], Lilyvale Small Holdings

1.3 Unit 1[...] in the Sectional Title Scheme De Kroon

Measuring 186.0000 square meters

Held by Deed of Transfer ST1[...]

Situated at Unit 1[...] De Kroon, Bloemfontein

2. Leave to return to the Honourable Court on the same papers, supplemented

where necessary, for an order declaring executable: -

Erf 8[...] Heliconhoogte EXT 2

Registration Division: Bloemfontein RD

Province of The Free State

Measuring 1400 (one thousand four hundred) square meters

Held by Deed of Transfer T17[...]

Situated at 3[...] O[...] D[...], Heliconhoogte

3. To compel the Second to Fourth Respondents to provide the Applicant with the information it requires to comply with Rule 46A of the Uniform Rules of Court.

4. The First Respondent be ordered to pay the costs of this application.’²

[6] The first respondent took three points in limine. These are ‘non-joinder’, ‘unilateral variation of a court order’ and ‘failure to comply with rule 46A’.

[7] The issue in limine of the non-joinder is vital. It is the case for the first respondent that the applicant has declared that the properties in question are under interdict by a third party. The interdict was registered and issued by way of a court order in favor of Herholdts Lighting Division (Pty) Ltd under case number 1742/2019. The properties are also under attachment by the same company with the same case number. Secondly, the applicant has failed to join the Registrar of

² Notice of motion issued on 13 September 2023.

Deeds that has a direct and substantial interest in the matter because of the above order. This is what the founding affidavit states:

'39. The reason for the Applicant seeking an order to declare executable all the properties listed above, as opposed to only one of the Properties, is as follows:

39.1. An interdict was registered over all the Properties by a third-party creditor, Herholdts Lighting Division (Pty) Ltd, as security for a judgment of R1,558 239.77 together with interest thereon at the rate of 10.25% from 18 April 2019 (the Interdict).

39.2 The Interdict was registered against each of the Properties at the Bloemfontein Deeds Office upon the instruction of Nixon & Collins Attorneys, as appears from "FA8-1" to "FA8-4" annexed hereto.

39.3 On 9 June 2023, Woodgett contacted Nixon & Collins Attorneys to ascertain whether their client's judgment, as the basis for the Interdict, had been settled. Woodgett was advised by one Bernice Handsel in the employ of Nixon and Collins Attorneys that their client's judgment debt, which now exceeds the sum of R2 000 000.00, remained outstanding and owing to their client.

39.4 As the net-sale proceeds of any sale in execution will be distributed pro-rata to the interdict-holders in accordance with their respective judgments, it is a strong probability, if not a foregone conclusion, that more than one of the Properties will need to be sold to settle the Applicant's claim.

40. Accordingly, the Applicant seeks an order to declare executable the Properties in the following order...'

[8] It is the argument of the applicant that on the version of the first respondent, rule 46 finds application and not rule 46A. Reliance on rule 46A(3)(b)

by the first respondent is specifically so, according to the applicant, misplaced. It states that:

‘(3) Every notice of application to declare residential immovable property executable shall be—

- (a) substantially in accordance with Form 2A of Schedule 1;
- (b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a):³ Provided that the court may order service on any other party it considers necessary;
- (c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and
- (d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.’

[9] The court had to call a halt to the proceedings on this issue and adjudicate on this point before the matter could proceed. The principal rule in this regard is that anyone with a direct and substantial interest in a matter must be joined; this is notwithstanding the arguments for the applicant on rule 46. Herholdts Lighting Division (Pty) Ltd has a clear interest in this matter. The Office of the Registrar of

³ ‘Subject to rule 46A and any order made by the court, no immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless—

- (a) the execution creditor has caused notice upon—
 - (i) preferent creditors;
 - (ii) the local authority, if the property is rated; and
 - (iii) the body corporate, if the property is a sectional title unit; calling upon the aforesaid entities to stipulate within 10 days of a date to be stated, a reasonable reserve price or to agree in writing to a sale without reserve, and has provided proof to the sheriff that such entities have so stipulated or agreed, or
- (b) the sheriff is satisfied that it is impossible to notify any preferent creditor, in terms of this rule, of the proposed sale, or such creditor, having been notified, has failed or neglected to stipulate a reserve price or to agree in writing to a sale without reserve as provided for in paragraph (a) within the time stated in such notice.’

Deeds provides oversight to deeds registries. It must be included in litigation of this nature to regulate the legality of the applications if necessary.

[10] The first respondent did not comply with the court order dated 25 April 2024 pertaining to the time for filing of the answering affidavit. Condonation was granted before the hearing commenced but it remains that the first respondent must carry the costs of the application as per party and party scale B. As to the issue in limine on joinder; costs will be reserved.

[11] **ORDER**

1. The non-compliance with the court order dated 25 April 2024 pertaining to the late filing of the answering affidavit by the first respondent, Samuel Matlabe Tshabalala, is condoned. The costs of the condonation application to be carried as per party and party scale B by the said first respondent, Samuel Matlabe Tshabalala.

2. The point in limine as raised by the first respondent on the issue of joinder succeeds and the applicant is granted leave to join the Registrar of Deeds and Herholdts Lighting Division (Pty) Ltd as interested parties to these proceedings. Costs are reserved on this issue in limine.

3. The matter is to be enrolled on the opposed roll for argument on the further points in limine on the 'unilateral variation of a court order', 'failure to comply with rule 46A', if still persisted with by the first respondent, and the merits of the application by the applicant.

Opperman J

Appearances

Applicant:

C J HENDRIKS

Bloemfontein

Instructed by Lynn & Main Inc.
Johannesburg
c/o Willers Attorneys
Bloemfontein

First Respondent:

S NGOMBANE
Cape Town
c/o Thebe Attorneys Inc.
Bloemfontein