

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-131277

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

17 February 2025

DATE

SIGNATURE

In the matter between:

SS ALOE RIDGE

Applicant

and

BEKINKOSI LLOYD NAWA

First Respondent

ROSE-MARY NAWA

Second Respondent

STANDARD BANK OF SOUTH AFRICA LTD

Third Respondent

MOGALE CITY LOCAL MUNICIPALITY

Fourth Respondent

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties / their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Caselines/CourtOnline by the Judge's secretary. The date of this order is deemed to be 17 February 2025.

J U D G M E N T (LEAVE TO APPEAL)

CORAM: LIEBENBERG AJ:

- [1] The applicant seeks leave to appeal the order I gave on 21 August 2024, dismissing its application in terms of Rule 46A, for authorisation to execute against an immovable property owned by the first and second respondents.
- [2] The application for leave to appeal was delivered outside the time period allowed in Rule 49(1)(b), necessitating an application for condonation. Whilst the explanation for the delay is not satisfactory in all respects, I deemed it in the interests of justice to grant condonation and determine the real issues in dispute.
- [3] In its notice for leave to appeal, the applicant raised seven grounds, conveniently grouped as follows:
 - [3.1] I erred in dealing with the interest rate applicable to the outstanding levies for formed part of the default judgment obtained against the first and second respondents on 22 November 2022 and making a finding in respect of the interest charged as it was not an issue for determination.

[3.2] I erred in finding that section 65 proceedings in the Magistrates Court, an emolument attachment order or a garnishee order would constitute a suitable alternative to executing against the immovable property.

[3.3] I failed to consider the prejudice to the applicant caused by the first and second respondent's continued non-payment of their levy obligations, and the expedience with which the applicant would obtain payment of such outstanding levies from any prospective buyer of the property.

[4] Execution is in itself not repulsive but part and parcel of economic activity. The rules of lower and higher courts provide mechanisms to exact payment of judgment debts. It is however, when there is a disproportionality between the method of execution and the extent of the judgment that debt alarm bells should start ringing. When a judgment debt can be satisfied in a reasonable manner, without the drastic consequences of losing a home, such alternative methods must be judicially considered.¹

[5] In the Constitutional dispensation, judicial oversight is required when an execution creditor, such as the applicant, wishes to execute against the immovable property of a judgment debtor, such as the first and second respondents. The provisions of Rule 46A facilitate the appropriate judicial oversight.

[6] Counsel for the parties are agreed that the judicial oversight envisaged by Rule 46A involves the exercising of a true discretion, that is one characterised by the fact that a number of courses are available to the court.² An appellate court will

¹ *Gundwana v Steko Development and others* 2011 (3) SA 608 (CC) at [53] – [54]

² *Media Workers Association of SA and Others v Press Corporation of SA Ltd* 1992 (4) SA 791 (A)

interfere with the exercise of a true discretion where the court of first instance exercised its discretionary power capriciously, or exercised its discretion upon a wrong principle or on an incorrect interpretation of the facts, or has not brought its unbiased judgment to bear on the question, or it has not acted for substantial reasons³, or reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles,⁴ or the choice of option by the court below does not lead to a just and expeditious decision⁵

[7] By virtue of section 17 of the Superior Courts Act,⁶ leave to appeal may only be granted where the Court is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard. As I understood Mr Smith, who appeared for the applicant, the applicant relies on the first of these grounds. Accordingly, it must demonstrate that there is a reasonable prospect of success in upsetting the decision made on 21 August 2024 pursuant to the exercise of the true discretion entrusted to this Court by Rule 46A.

[8] On 23 November 2022, the applicant obtained default judgment for an amount of R 112 347.22 together with interest on the capital amount at the rate of 7.25% per annum and costs as between attorney-and-client to be taxed. This is the

³ *Ferris v First Rand Bank* 2014 (3) SA 39 (CC) at para 28.

⁴ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para [11].

⁵ *Lombaard v Droprop* 2010 (5) SA 1 (SCA) at para [29].

⁶ Act 10 of 2013.

judgment debt the applicant is entitled to execute on, and which formed the basis of the application before this Court on 21 August 2024.

- [9] In relation to the interest issue, on the documents filed of record, the first and second respondents plainly disputed the rate of interest levied on arrear amounts as reflected on the statements of account annexed to the founding affidavit. It was only in reply, that the applicant provided evidence of a resolution of an Annual Meeting of Members on 9 September 2022 (which postdates the institution of the action in the Magistrates' Court) authorising the levying of interest at the rate of 21% per annum.
- [10] The statements of account clearly evidence the applicant having levied interest at the rate of 21% prior to the date of the resolution, also on the capital amount of the default judgment which attracts interest at a substantially lower rate. As it apparent from the main judgment, this Court expressed concern that the rate of 21% exceeds the maximum rate permitted by section 105 of the National Credit Act,⁷ without making any finding on this score.
- [11] Manifestly, these disputes have a bearing on the extent of the outstanding levies due by the first and second respondents to the applicant, which is a mandatory consideration in terms of Rule 46A(5)(e). Accordingly, this Court was obliged to and did consider the interest issue.
- [12] In respect of the alternate remedy issue, Mr Smith did not persist with the applicant's complaint that the Court erred in finding that section 65 proceedings in the Magistrates Court is a suitable alternative to declaring the immovable

⁷ Act 34 of 2005

property executable. The concession was properly made, as no such finding was in fact made. There can be no debate that the Magistrates' Court Act and the rules thereunder make ample provision for alternative methods of execution, including warrants of execution against movables, attachment of emoluments or garnishees, or a financial enquiry in terms of section 65 of that Act.

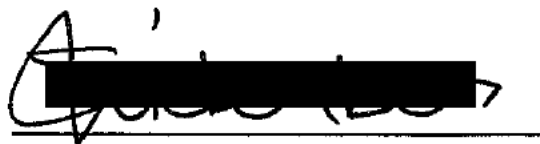
[13] The applicant did not play open cards, referring to prior actions and/or judgments it had obtained against the first and second respondents, or the agreement reached during section 65 proceedings in the lower court. Why the sheriff did not attach the motor vehicle which the first and second respondents profess to own, is not clear.

[14] The main object of section 65A is to create a procedure in terms whereof a judgment debtor may be brought before a magistrate in chambers in order to enable the court to inquire into the financial position of such debtor where he has not satisfied a judgment for the payment of a sum of money granted against him, and to enable the court to make such order, which has as its aim the settlement of the judgment debt, as it may deem just and equitable.⁸ Absent such an enquiry, it does not behove the applicant to complain that section 65 proceedings will not yield any satisfaction of the judgment granted on 23 November 2022.

[15] There is also no merit to the applicant's assertion that the first and second respondents are not paying their monthly levies obligations, when the amount of R 3 500.00 they do pay, exceed the levies debited to the account by a margin of about R 1 000.00.

⁸ *Lombard v Minister Van Verdediging* 2002 (3) SA 242 (T)

- [16] In the final instance, the applicant is only entitled to execute against the judgment it obtained utilising the provisions of Rule 46A. It cannot utilise the Rule to recoup other unpaid contributions and charges, including untaxed legal fees, owed to it by the first and second respondent circumventing the procurement of a judgment.
- [17] In relation to the prejudice issue, I accept that the applicant and its constituent members suffer prejudice when members do not pay their dues. To ameliorate the prejudice, the applicant is at liberty to approach a court of law for a judgment against recalcitrant members, and to execute on such judgments. Yet, I am also to consider the prejudice the first and second respondents will suffer should they lose their primary residence.
- [18] The judgment debt is relatively trivial in comparison to the market value of the immovable property. I am satisfied that there are indeed more proportionate means to attain satisfaction of the judgment debt other than declaring the first and second respondent's primary residence executable. I am also satisfied that the applicant does not have a reasonable prospect of success in upending the order this Court made based on the exercise of the true discretion afforded to it.
- [19] In the result, the application for leave to appeal is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Sarita Liebenberg', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

SARITA LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicant:	Adv R Smith
For the first and second respondents:	Mr B Mokgothu
Heard on:	13 February 2025
Judgment:	17 February 2025