

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 003488/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: / NO
- (2) OF INTEREST TO OTHER JUDGES: / YES
- (3) NOT REVISED.

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07 FEBRUARY 2023
DATE

.....
SIGNATURE

In the matter between:

NEDBANK LIMITED

Applicant

and

LETLHOGONOLO LAZARUS MOHLAMPE

Respondent

Coram: FISHER J

Heard: 01 February 2023

Delivered: 07 February 2023

Summary: – An unopposed application in which the Applicant seeks to obtain an order for substituted service against the Respondent for purposes of a Rule 46A foreclosure.

ORDER

I make an order which reads as follows:

1. The application for substituted service is dismissed;
2. The balance of the relief is postponed sine die.

JUDGMENT

Fisher J

Introduction:

- [1] The rule 46A procedure dealing with foreclosures on immovable property which is the home of the defendant is rigorous and exacting. This is to be expected in that such an application deals integrally with the constitutional rights of people in that the ultimate and often inevitable result is the loss of a home.
- [2] It is acknowledged that the legislative scheme brought about by Rule 46A creates challenges for financial institutions and their attorneys. Unfortunately, give the imperatives at play, this is unavoidable.
- [3] One of the more challenging aspects of the scheme is the requirement of personal service. The courts are adamant that no person should be rendered potentially homeless without evidence that the process for the foreclosure has not reached them personally.
- [4] I have noticed on the unopposed roll a new and creative trend entailing an attempt to invoke the rule dealing which is obviously aimed at circumventing difficulties experienced in serving process personally. This case is one such matter.
- [5] It is opportune in this context to restate the law relating to substituted service.

The application:

- [6] The application is in drawn in the usual way seeking default judgment and an order declaring the immovable property executable for the alleged indebtedness.

- [7] The application is unusual however in that it seeks an alternative prayer which reads as follows:

'ALTERNATIVELY and in the event that judgment is refused due to lack of sufficient service, that substituted service be granted as follows: -

6. Substituted service of the application for judgment is authorised; The Plaintiff must serve the application in the following manner: -

- a. Transmission of the application through electronic mail;
- b. Notification through SMS that the application is available for collection at the offices of the Plaintiff's offices (sic) situated at 256 Surrey Avenue, Ferndale, Randburg;
- c. A copy of the application to be dispatched through registered post to the *domicilium citandi et executandi* and the mortgaged property (if different to the domicile address).'

- [8] The personal service was not achieved. The sheriff's return confirms that the application was served on 9 January 2023 at the *domicilium* address by affixing same to the principal gate.

- [9] The applicant sought on the strength of the fact that the sheriff had attempted to serve but had not been able to do so to obtain the alternative relief – i.e. service of the foreclosure application by way of substituted service.

- [10] I now turn to consider the legal prescripts relating to substituted service with reference to this relief.

Legal principles:

- [11] Substituted service is ordered when a usual form of service or as in this case the service provided for – i.e. personal service - is not possible.

[12] Rule 4 provides:

(2) If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of sub rule (2) of rule 5 shall, mutatis mutandis, apply.'

[13] Thus, the jurisdictional fact necessary for the bringing of the application is that personal service is not possible. This predicament must exist as at the time of the launching of the application. It cannot come about subsequently.

[14] The application for substituted service constitutes a cynical attempt to circumvent the service provisions provided for in rule 46A and the practice directives in relation to this rule.

[15] The application is thus ill-founded.

Order:

I thus order as follows:

1. The application for substituted service is dismissed;
2. The balance of the relief is postponed sine die.



D FISHER
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant:

Adv. Sanet van Aswegen

Instructed by:

BVZ Incorporated