

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO: 3305/2023

In the matter between:

N[...] S[...] B[...]

Applicant

and

A[...] F[...] B[...]

First Respondent

SA HOME LOANS (PTY) LTD

Second Respondent

JUDGMENT

PAKATI J

Introduction

[1] The applicant applies for an order declaring the immovable property, described as Erf [...], in extent [...] square metres held by deed of transfer T66516/2000, situated at [...] A[...] Street, Makhanda, Eastern Cape Province (“the property”), owned by the first respondent, to be specially executable in terms of Rule 46A of the Uniform Rules of Court. She further seeks an order in terms of which the registrar is authorised and directed to issue a writ of execution against the immovable property and that a reasonable reserve price be set in terms of Rule 46A. The first respondent opposed the application.

The parties

[2] The applicant, Ms N[...] S[...] B[...], is employed by the National Prosecuting Authority (“NPA”) as the Assistant Director (Demand and Acquisition Supply Chain) in Silverton, Pretoria.

[3] The first respondent, Mr A[...] F[...] B[...], is an attorney and associate at Mgangatho Attorneys, residing in the property. The second respondent is SA Home Loans (Pty) Ltd, a private company with its registered address at 2 Milkwood Crescent, Milkwood Park, Umhlanga, Kwa-Zulu Natal Province. It is

also the bondholder of the property which the applicant wishes the court to declare executable.

The issue

[4] The issue is whether the applicant has made out a case for the order of executability of the immovable property which used to be the common home of the applicant and the first respondent before they divorced in 2016.

Common cause facts

[5] It is common cause that the first respondent is indebted to the applicant in respect of unpaid legal costs in the sum of R829 654-97 granted against him when he and the applicant were involved in litigation pertaining to this matter. The first respondent confirmed that the property has been the subject of litigation in this Court, the SCA and the Constitutional Court.

Undisputed facts

[6] It is undisputed that the first respondent has failed to settle the liabilities in respect of the property within 24 months of granting the divorce. On the date the founding affidavit was deposed, the outstanding bond amount in respect of the

property was R2 441-99. This can be gleaned from the second respondent's letter addressed to the applicant dated 06 July 2023, which records:

“The debit order due on 2023/07/03 in the amount of R975.38 in respect of your home loan held under SA Home Loans account number 2364241 was returned unpaid. Due to this unpaid debit, your loan account is now in arrears for the sum of R2441.99.”

Background facts

[7] The applicant and the first respondent were co-owners of the property. They entered into a settlement agreement which was made an order of court on 12 July 2016, after a lengthy and acrimonious divorce. In terms of paragraph 5 of the said settlement agreement, the first respondent undertook full responsibility for settling the liabilities in respect of the property within 24 months of granting of the divorce order as follows:

“5.1 It is expressly recorded that the Plaintiff will undertake full responsibility for the settling of the liabilities, if any, currently existing on the following immovable properties:

5.1.1 the common home being [...] A[...] Street, Grahamstown, and

5.1.2 the undeveloped properties identified as Erven 30, 40, 41, 42, 43, 44, and 45, East London, and owned by Tradesoon 27 (Pty) Ltd.

- 5.2 the Plaintiff will, in accordance with the provisions of Section 45bis of the Deeds Registries Act, Act 47 of 1937, and within 24 months of the date of the issuing of the Decree of Divorce arrange for the substitution of the Defendant as debtor.
- 5.3 Upon the settling of such liabilities the Defendant undertakes to ensure transfer to any and all property rights she may have in the properties into the name of the Plaintiff, or any entity nominated by him for that purpose, at which stage the properties will become his exclusively. The cost of such transfer(s) will be borne by the Plaintiff.”

[8] However, the first respondent failed to comply with paragraph 5 of the settlement agreement and did not substitute the applicant as a co-debtor under the bond. He failed to settle the liabilities in respect of the property. At the time the applicant and first respondent got divorced, the bond on the property was approximately R700 000-00. This resulted in the applicant being repeatedly faced with threats of legal action by the second respondent as the joint bond holder via letters and persistent telephone calls informing her that the first respondent did not pay the monthly bond instalments. The failure of the first respondent to comply with his obligations led the applicant to launch various applications as well as having him found to be in contempt of court as it appears in the order granted by Mfenyana AJ, on 15 January 2020. The said order reads:

“It is ordered:

1. THAT the Respondent be and hereby held in contempt of the order issued on [12] July 2016.
2. THAT the Respondent be and is hereby directed to comply with paragraph 5 of the order within and substituted the Applicant within 90 days of this order.
3. THAT the Respondent is sentenced to six months imprisonment wholly suspended for a period of two years on condition that he complies with paragraph (2) of this order.
4. THAT in the event that the Respondent fails to comply with this order the Applicant be and hereby authorized to approach the Court on the same papers, duly amplified calling upon the Respondent to show cause why he should not be committed to prison
5. THAT paragraphs 13-52 of the Respondent’s answering affidavit be and is hereby struck out.
6. THAT the counter-application by the Respondent be and is hereby dismissed with costs, which costs shall include costs of two counsel.
7. THAT the Respondent be and is hereby directed to pay the costs of this application on attorney and client scale, which costs shall include the costs of two counsel.”

[9] The costs referred to above were taxed and allocated on 23 June 2021, in the sum of R215 404.49. The litigation against the first respondent resulted in substantial amounts in costs granted against him.

[10] The first respondent brought an urgent application to stay the execution of a writ issued relating to the costs mentioned above but was dismissed. He was ordered to pay the costs of this application including costs of two counsel which were taxed and allocated on 12 December 2022, in the amount of R153 913-19. The second application to stay execution was withdrawn and he was ordered to pay costs on party and party scale. These costs were taxed and allocated on 12 December 2022, in the sum of R227 476-37.

[11] On 08 July 2021, the sheriff proceeded to No. 100 High Street, Makhanda, the first respondent's place of employment and served him with the writ of execution, personally. Thereafter, he attached the first respondent's office equipment and a VW Tiguan motor vehicle with registration number JDB 853 EC. At that instance, the first respondent alleged that he did not own the office equipment and that the motor vehicle was the bank's property.

[12] On 03 August 2021, the first respondent was granted condonation by the Supreme Court of Appeal but his application for reconsideration for leave to appeal was dismissed with costs. The said costs were taxed and allocated on 18 May 2022, in the sum of R108 313-53.

[13] On 05 August 2021, the writ of execution was re-issued, and the sheriff was directed by the applicant's attorney of record to take into execution the first respondent's movable assets found in the property. The first respondent applied for the stay of the writ of execution pending an application for leave to appeal against the contempt of court decision which was refused by the Constitutional Court on 13 October 2021. The first respondent withdrew his application for the stay of the execution.

[14] The applicant is unaware of the status of the taxed bill of costs in respect of the application for leave to appeal. Considering the costs granted against the first respondent in the above matters, he is to date indebted to the applicant in the amount of R829 654-97. He has paid nothing to date. The sheriff attempted to attach the movable property regarding the first costs order in the amount of R215 404-49.

[15] On 02 December 2021, the sheriff removed the first respondent's motor vehicle which was later released as it was still the bank's property. The second return of service which was also served on the first respondent personally, returned with a *nulla bona* return in respect of the movables. A further writ was issued on 03 December 2021, directing the sheriff to attach and take into execution the incorporeal property being the right, title, and interest of the first respondent's shares in Billegro Legal Cost Consultants (Pty) Ltd, a private company with its registered address at 53 African Street, Makhanda. However, on 10 December 2021, the applicant's attorney of record was informed that no share certificate in respect of the company could be found, and the sheriff was unable to effect service. Seeing that no movable property in the name of the first respondent could be attached by the sheriff, the applicant instructed her attorney to launch an application to have his immovable property declared executable. The first respondent opposed that application. Norman J dismissed the said application because the applicant did not first excuss the first respondent's movable property.

[16] On 22 September 2022, the sheriff executed a further writ at the home of the first respondent and attached his movables. A sale in execution was arranged to take place on 03 February 2023 but did not take place because the items could not be removed from the first respondent's home as he was unavailable. Subsequently,

the sale was arranged to take place on 05 May 2023, and the first respondent was duly notified. The notice was placed in the Herald Newspaper, on the notice board in the magistrate's court and High Court and the first respondent was served with same. The sale generated an amount of R3 310-00 with the sheriff's fees totalling an amount of R899-00. The applicant argues that she has attempted on various occasions to have the first respondent's movable property attached. Obviously, the sale of the movables would not cover the outstanding debt and interest owed, the argument continues. The applicant urged the Court to set a reserve price of R550 000-00 which in her opinion, is reasonable.

The first respondent's case

[17] The first respondent raised two points *in limine* namely, non-joinder of parties affected by the relief sought by the applicant and *res judicata*. For this assertion, he relied on Rule 46A (3) (b) which provides:

“(3) Every notice of application to declare residential immovable property executable shall be-

(a)...

(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): Provided that the court may order service on any other party it considers necessary.”

[18] The first respondent contends that the applicant should also give notice to preferent creditors and local authority if the property is rated provided that the court may order service on any other party it considers necessary. The applicant, as the party to the litigation, should also join other parties who have a direct and substantial interest in the outcome of the litigation. For the above assertion, he relies on *Motlounq and Another v The Sheriff, Pretoria East, and Others*¹. Mr Brown, for the applicant, submitted that it was not necessary to join and serve the municipality and Ms fani.

[19] Though the subrule may be peremptory as regards the preferent creditor, local authority and body corporate, and failure to comply with its provisions may render a sale invalid, this does not entitle a judgment debtor for whose benefit the rule was not made, to rely on such non-compliance.²

[20] Regarding *res judicata*, the first respondent submitted that this is not the first application for leave to execute against the property. The same application, between the same parties, concerning the same cause of action and seeking the same relief, was dismissed by Norman J on 25 October 2022. He submits further

¹ 2020 (5) SA 123 (SCA) at para 11 where the court held: “The rule says that the ‘summons shall be signed and issued by the registrar’. The word ‘shall’ does not necessarily denote a peremptory provision.”

² Erasmus: Superior Court Practice Vol 2 at page D1-615.

that ‘*the lis between the parties has been disposed of and the matter is res judicata.*’ He requests that leave to execute the property be dismissed with costs.

[21] The submission by the first respondent regarding *res judicata* ignores to state the reason why Norman J dismissed the application relying on *Barclays Nasionale Bank Bpk v Badenhorst 1973 (1) SA 333 (N)*. In paragraph 40 of her judgment, Norman J stated:

“[40] It follows that where the creditor has not excused against movables it cannot succeed in the relief sought against the immovable property.”

[22] In the present case, the applicant has excused against the movable property. Therefore, *res judicata* cannot stand.

[23] Reverting to this application, the first respondent submits that the release of the applicant from the bond obligations in respect of the immovable property is effectively moot. That is because, on 14 March 2022, he paid the last instalment of approximately R547 000-00 due to the bondholder and their attorneys have been instructed to cancel the bond and effect the endorsement in terms of Section 45bis (1) (b) of the Deeds Registries Act 47 of 1937³. The applicant therefore executes

³ Section 45bis (1) (b) of the Deeds Registries Act 47 of 1937, provides:

against his immovable property in pursuance of costs orders obtained against him, as alluded to.

[24] The first respondent contends that a possibility exists that through mediation in terms of Rule 41A of the Uniform Rules of Court⁴, the dispute between the parties might be resolved. That is because the applicant communicated with him *via* WhatsApp messages wherein, she requested him to assist her with an issue concerning one of their daughters. He states that during this conversation, the applicant expressed regret for the mistakes she made in their relationship including

“45bis Endorsement of deeds on divorce, division of joint estate, or change of matrimonial property system

- (1) If immovable property or a lease under any law relating to land settlement or a bond is registered in a deeds registry and it-
 - (a) ...
 - (b) forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorization, under section 20 or 21 (1) of the Matrimonial Property Act, 1984 ([Act 88 of 1984](#)), or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses, the registrar may, on written application by the spouse concerned and accompanied by such documents as the registrar deems necessary, endorse on the title deeds of the property or on the lease or the bond that such spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse, as the case may be, in the property, lease or bond.

⁴ Rule 41A (1) of the Uniform Rules of Court states: (1) In this rule -mediation means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.”

the course of action she embarked upon. However, the applicant’s attorneys failed to deliver a notice in terms of Rule 41A (2) (b)⁵. The WhatsApp exchange records:

“Applicant	Respondent	Translation by 1 st respondent
Ek besef ek [het] Mistakes gemaak het maar so het jy ook		I realise that I made mistakes but so did you.
Ons groot		We are adults.
So los ons history en help ons kinders om beter lewens te ly		So, leave our history and help our kids to lead better lives.
	Right, vertel my van jou foute Want ten minste is dit die erkenning wat jy maak.	Right. Tell me of your mistakes because it is at least the first because first acknowledgement that you are making.
[Dis] al wat ek vra.		It is all I ask. .
Ja ek kan se wat my Foute was maar jy [ook] mos foute gemaak		Yes, I can say what my mistakes were, but you also made mistakes.
[Ek] het baie.		I have many.
...		...
Ek weet dit nou.		I know it now.
Maar hulle tel nou.		But they count now.”

⁵ Rule 41A (2) (b) provides: A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff’s or applicant’s attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.”

[25] The first respondent contends further that this conversation was ‘*a genuine and contrite expression of regret for the mistakes that she made in our relationship, not only personally but also, when she embarked on the litigation that she embarked on.*’ He states that ‘*I have no doubt that the applicant and I will come to a mutually acceptable resolution of the dispute after having engaged in such court annexed mediation process.*’ he contends further that he intends to settle the legal costs in a matter of months. However, he does not give details of how he intends to achieve this.

[26] The first respondent states that there is no mention that he had paid legal costs of an amount more than R120 000-00. The applicant asserts that the first respondent paid R130 791-47 on 20 July 2022 and made no further payments. She adds that as of 12 December 2022, the outstanding balance was R803 317-58 excluding interest in the amount of R90 373-22 which brings the total amount to R893 690-80. He also states that prior to the passing of his father, he was engaged in finalising bills of costs for work done on behalf of various clients estimated at an amount of R2 million. These fees would exceed the amount due to the applicant by a substantial amount. The amount due to the applicant could be paid in a matter of months. However, the said process was interrupted by the illness and subsequent passing of his father. He does not disclose how this was going to be achievable

considering that in paragraph 1 of the answering affidavit, he is an associate at Mgangatho Attorneys. If that is the case, it is unclear how such fees could accrue to him personally for services rendered and not the firm of attorneys he works for. According to the applicant, he is unable to get a fidelity fund certificate in his own name. The first respondent did not mention whether he had other creditors except the applicant.

[27] The first respondent contends that the order should not be granted due to ‘*important policy and constitutional considerations.*’ He contends further that he stays with Ms Bernita Fani and her granddaughter, Azo Fani. Ms Fani was his and the applicant’s babysitter while their children were growing up and has been with them for 25 years. He says:

“38.1 She has basically dedicated her entire adult life raising the now adult children of the applicant and I.

38.2 Ms Fani has no home other than the property in question.

38.3 Ms Fani will continue to be in my employment until her retirement at the age of 60 years.”

[28] The first respondent added that Ms Fani’s granddaughter attends preschool not far from the property and will continue to do so. He added: “*Ensuring that her*

granddaughter have a good quality of life, and for Ms Fani to spend with her granddaughter is the proper thing to do, after a life in service to the children of the applicant and I.” What is strange though is that the first respondent did not attach Ms Fani’s confirmatory affidavit. Therefore, this allegation remains hearsay.

Legal Authorities

[29] Rule 46A (2) (b) provides:

“2(b) 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.”

[30] In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*⁶ the Court remarked:

“[60] In summing up, factors that a court might consider, but to which a court is not limited, are: the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of the debt;

⁶ (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004) in para 60. See also *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011) at para 54, where the Court held: “It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”

whether the debtor is employed or has a source of income to pay off the debt and any other factor relevant to the particular facts of the case before the court.”

[31] Rogers J in *Changing Tides 17 (Pty) Ltd NO v Frasenburg*⁷

“[51] In making the rule 46A assessment, the prospect of the judgment debt being satisfied without recourse to the mortgaged property has to be investigated. If a debtor is substantially in arrears and fails to place information before court pointing to the existence of other assets from which the indebtedness might be satisfied, a court would generally be justified in proceeding on the basis that execution against the mortgaged property is the only means of satisfying the mortgagee’s claim.”

[32] The first respondent has not provided information which would enable this Court to assess the possibility of the judgment debt being satisfied from a source other than the sale of immovable property. He has not set out facts relevant to his ability to discharge the debt and has failed to place information before court pointing to the existence of other movable assets from which the indebtedness might be satisfied. What is common cause is that he is an attorney practising in this court with considerable experience and has the insight of the consequences of failure to comply with court orders. The judgment debt is a substantial amount of money. However, he earns a salary which would enable him to pay off the debt. He

⁷ (19353/2019) [2020] ZAWCHC 59; [2020] 4 All SA 87 (WCC) (2 July 2020) at para 51.

has not disclosed his financial circumstances. Furthermore, in his answering affidavit, he did not disclose what attempts he made to pay off the debt. The information that he has provided does not show that he has made any attempts to settle the debt. Instead, he repeatedly avoided his obligations. His attitude exhibits unwillingness on his part to settle the debt and uses delaying tactics.

[33] The applicant is employed by the NPA as an Assistant Director, as alluded to . Undoubtedly, she has been prejudiced by the conduct of the first respondent regarding the legal expenses she had to incur to obtain compliance by the first respondent of his lawful obligations arising from their divorce.

[34] In *Nkola v Argent Steel Group (Pty) Limited t/a Phoenix Steel*⁸ Lewis JA (Saldulker and Swain JJA and Pillay and Makgoka AJJA concurring) remarked:

“[15] ...as a result of these decisions, is that in all cases where a debtor’s home is in issue, a court must look at the circumstances of the debtor and exercise a discretion... The proviso reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy without a proper consideration of his or her circumstances.

⁸ (406/2017) [2018] ZASCA 29; 2019 (2) SA 216 (SCA) (26 March 2018) at para 15 and 16.

[16] In exercising her discretion in the court of first instance, Jacobs AJ considered all Mr Nkola's circumstances as set out in his answering affidavit... Mr Nkola, on his own account, is not the kind of person who qualifies for the protection required by *Gundwana*."

[35] In her replying affidavit, the applicant did not consent to mediation. She submits that the first respondent took the WhatsApp messages out of context. She explained that *'the context was personal issues engaged in between the first respondent and I regarding one of our daughters. Whatever may have happened between us, it is still necessary to engage with regards to our children.'* She added that the mistakes she referred to were those relating to parenting. Notably, the answering affidavit was filed on 30 October 2023, and the notice in terms of Rule 41A in response to the first respondent's Rule 41A notice was filed on 01 November 2023, and hand-delivered at the offices of the first respondent the same day at 14h17. That explains the reason why the first respondent laboured under the impression that no response was received from the applicant's attorneys.

[36] The first respondent states that on 14 March 2022, he paid *'the last of approximately R547 000-00 due to the bondholder and that their attorneys have been instructed to cancel the bond and effect the endorsement in terms of section 45bis (1) (b) of the Deeds Registries Act, 1937.'* He further states that the bond

obligation in respect of the immovable property is effectively moot which is disputed by the applicant. The letter from the second respondent (“NB22”) clearly records that the loan account is still in arrears, as shown in paragraph 5 above. It therefore cannot be correct that the first respondent had instructed the second respondent to cancel the bond because the loan account is still in arrears. He was not candid with the court in this regard.

[37] The first respondent acknowledges that the bills that have been taxed have to be paid. To explain the failure to pay these bills, he asserts that he had been engaged in finalizing the bill of costs for work done on behalf of various clients of his estimated value of more than R2 million. This creates an impression that the whole amount would be available for payment of what he owes to the applicant and yet up to the time the matter was heard, he led no evidence that he was owed an amount of R2 million.

[38] The applicant asserts that the market value of the property is R825 000-00, according to IPC Properties and the municipal value, is R1 502 900-00. She asserts further that a reasonable reserve price for the immovable property is R550 000-00. The first respondent proposes a reserve price of R1.2 million which, according to him, is reasonable considering that the evaluation of a similar-sized property close

to where his property is, is R1.6 million. He requests that the matter be postponed *sine die* pending finalisation of Rule 41A, the mediation process.

[39] In terms of Rule 46A (8) (e) operating since December 2017, the court is empowered to set a reserve price for the property at the sale in execution. In determining such reserve price, I consider the facts of the applicant and the first respondent. In my view, a reserve price of R650 000-00 is reasonable in the circumstances of this case.

[40] Regarding Ms Fani and her granddaughter, the first respondent is employed as an attorney and can pay rent as alternative accommodation for himself, Ms Fani and her granddaughter especially since he still needs to keep them.

[41] The first respondent has blatantly avoided making good his obligations towards the applicant. His conduct of avoiding the sale is consistent with the obstructive and vexatious conduct throughout the litigation of this matter.

[42] The first respondent has failed to comply with what he agreed to do and consented that it be made an order of court. He frustrated the sheriff when attempting to execute in respect of the movable property.

[43] In considering the circumstances of the first respondent, I restate that he is an experienced lawyer who has been practising for a considerable period in this court. He admitted his indebtedness to the applicant, notwithstanding his knowledge of the law and ethical obligations as an officer of the court. He has done nothing but delay and undermine the discharging of the debt. In a judgment by Jolwana J where the applicant sought an order to commit him to prison for his failure to comply with the court order of Mfenyana AJ dated 15 January 2020, he had this to say:⁹

“[5] The respondent had by then exhausted all possible avenues within the South African legal framework which he invoked in order to avoid having to purge his contempt of the court order of Kahla AJ dating back as far as 12 July 2016. Most importantly, he made all the unmeritorious and dilatory applications for leave to appeal in order to avoid being compelled to do that which he personally undertook to do in terms of the deed of settlement. He had ample opportunity to purge his contempt but failed to do so.”

[44] *In casu*, the first respondent is not a poor person who runs the risk of losing a home. He is an officer of the court, as alluded to. Notably, he has been found guilty of contempt of the court. In my view, having considered the circumstances of the first respondent, execution against the mortgaged property is the only means of satisfying the judgment debt.

⁹ At para 5.

[45] The applicant had no option but to approach the court for relief as set out in the notice of motion. In the circumstances of this case, the applicant has made out a case for the order sought and it is just and equitable to grant the execution against the immovable property. The first respondent is not the kind of person who qualifies for protection. The matter can therefore not be postponed sine die pending finalisation as the applicant opposes referral of the dispute to mediation.

Costs

[46] The outstanding issue is costs. It is a fundamental principle that a party who succeeds should be awarded costs and this rule should not be departed from except on good grounds.¹⁰ The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have concluded.¹¹ In this instance, there is no reason why the first respondent should not be ordered to pay costs of this application. In my view, a costs order on a scale as between attorney and client is justified in the circumstances.

Reserved costs of 03 October 2023

¹⁰ South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) at 912.

¹¹ Beinash v Wixley [1997] 2 All SA 241; 1997 (3) SA 721 (A).

[47] Mr Brown submitted that the order granted on the day, was by agreement between the parties and those were costs in the cause. The first respondent should therefore be liable for those costs. That is because the applicant was in motion court and the matter was postponed because it was opposed. On the other hand, the first respondent argued that on Thursday 28 September 2023, the applicant sought to enrol the matter on uncontested roll and yet on 29 September 2023 was the last day for him to file a notice to oppose rendering the setting down of the matter premature. He argued further that the costs were unnecessary as he still had an opportunity to file the notice to oppose.

[48] The application in this matter was filed and served on the first respondent on 14 September 2023, at 12h08. He had ten days after the date of service of the application to notify the applicant's attorneys if he intended to oppose it on 29 September 2023. However, on 28 September 2023, the attorneys of record of the applicant filed and served on the respondent a '*notice of set down uncontested opposed*' in terms of Rule 15(k) of the joint Rules of Practice for hearing on 03 October 2023. On 29 September 2023, the respondent filed and served on the applicant a notice of irregular proceedings in terms of Rule 30, notifying the applicant that he would apply for the matter to be struck from the uncontested

unopposed roll and that the applicant's attorneys would be ordered to pay costs occasioned therewith on a scale as '*between attorney and client, and de bonis propriis.*'

[49] In my view, the notice of set down of the uncontested application was served prematurely. Clearly, the applicant's attorneys were informed of this by the first respondent when he served and filed the notice in terms of Rule 30 on 29 September 2023. Mr Brown confirmed that the matter was set down on the day when dies were expiring. In my view, the costs of 03 October 2023 should be paid by the applicant and cannot be costs in the cause, as the applicant alleges.

Order

In the circumstances, I issue the following order:

- 1. The immovable property described as Erf [...], Makhanda, Eastern Cape Province in extent: [...] square metres held by deed of transfer T66516/2000, is declared specially executable and to this end, the registrar is authorized and directed to issue a writ of**

execution against the said immovable property in terms of Rule 46 (1) (a) of the Uniform Rules of Court.

- 2. A reasonable reserve price is set at R 650 000-00 in terms of Rule 46A of the Uniform Rules of Court.**
- 3. The first respondent is ordered to pay costs of this application on attorney and client scale.**
- 4. The applicant is ordered to pay the reserved costs of 03 October 2023 on a scale as between party and party.**

BM PAKATI

**JUDGE OF THE HIGH COURT, EASTERN CAPE DIVISION,
GQEBERHA**

APPEARANCES:

Counsel for the Appellant : *Adv G Brown*

Instructed by : Wheeldon Rushmere & Cle Inc

For the Respondent : Mr A[...] F[...] B[...]

Heard on : 15 February 2024

Judgment Delivered on : 31 May 2024