IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 2757/2020

In the matter between:

CHANGING TIDES 17 (PROPRIETARY)

LIMITED N. O **Plaintiff**

And

BASIL MAYNARD TYLER **1ST Defendant**

YOLANDE TINA TYLER **2ndDefendant**

JUDGMENT

Zono AJ

[1] On 11th November 2020 the plaintiff instituted action proceedings in this court enforcing the credit agreement that was concluded between the plaintiff and the defendants on 07th September 2005 at Port Elizabeth. In terms of the contract the plaintiff would lend first and

second defendant the Capital amount, which would in turn be paid in instalments as stipulated in the schedule to the loan agreement.

[2] In the event of default of payment by the defendants their indebtedness to the plaintiff would become due and payable. The plaintiff's case is that the defendant breached the contract and fell in arrears in the amount of **R270 257.10.**

[3] In its prayer the plaintiff prays for judgment against the first and second defendant as follows:

*a) Payment of **R270 257.10***

*b) Interest on the sum of **R270 257.10** at the rate of **5.60%** per annum compounded monthly in arrear from the 09th day September 2020 to date of payment.*

c) An order:

i. Declaring Erf 2311 KABEGA,

In the Nelson Mandela Metropolitan Municipality, Division of Port Elizabeth,

Province of the Eastern Cape, in extent 782 (Seven Hundred and Eighty-Two) Square meters,

Held by Deed of Transfer T4457/2002, subject to the conditions therein contained, to be specially executable;

ii. Authorizing the Registrar of this court to issue a warrant of Execution against the immovable property as described in prayer (c)(i).

(d) Costs of suit on an attorney and own client scale.

(e) Further and/ or alternative relief

[4] Sequel to the institution of these proceedings, a settlement agreement was entered between the parties on 30th January 2021. On the same date the defendant signed consent to judgment in terms of Rule 31(1) of the same amount of **R270 257.10.** It is contended that the defendants failed to honour the terms of the settlement agreement. That failure triggered the institution of the present application for default judgment. The relief sought in the application for default judgment is exactly the same relief sought in the combined summons.

[5] The matter was brought and set down in the opposed motion court as an application for default judgment. Normally applications for default judgment serve before unopposed motion court.

[6] The matter was brought in terms of **Rule 41 (4) and Rule 46A of the Uniform Rules.** The plaintiff seeks to execute against the residential immovable property of the defendants. That is sought in addition to the monetary judgment for the amount of **R270 257.10** and interest.

[7] **Rule 46A** provides that:

"(2) (a) A court considered an application under this Rule must-

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) Consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorize 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"[1]

[8] An equivalent provision appears in **Rule 46 of the Uniform Rules** which provides as follows:

*"(a) Subject to the provisions of **Rule 46A**, no writ of execution against the immovable property of any judgment debtor shall be issued unless-*

(i) A return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ."

[9] The use of the word "*judgment debt"* in both provisions presupposes that the provision of these Rules can only be invoked once there is a monetary judgment duly obtained. It was never an intention of the Rule-Maker that an action for monetary judgment be instituted simultaneously with the process seeking to execute against the immovable property of the judgment debtor. It was never envisaged that a monetary judgment can be obtained simultaneously with the order of execution against an immovable property.

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[1] **See *Jafta v Schoeman and Other, Van Rooyen v Stoltz and others*** 2005 (2) SA 140 (CC) Para 58-60**;** ***Gundwana v Sleko Developmnet and others*** 2011 (3) SA 608 (CC) Para 57.

[10] There is yet another reason why an order declaring an immovable property executable cannot be granted in the same action or simultaneously with the monetary judgment. The Rules provide that "*there must be a return made of any process issued against the movable property of the judgment debt from which it appears that the said person has insufficient movable property to satisfy the writ*."[2] Alternatively, the court must "*consider if there are alternative means by the judgment debtor of satisfying the judgment other than execution against the judgment debtor's primary residence."*[3]

[11] From this setting it was clear from the beginning that there is no case made out for the relief sought in prayer (c) of the particulars of claim, for an order to declare defendants' immovable property to be executable. The quest for that relief persisted even during the application for default judgment where the plaintiff sought the same relief of executability of defendants' immovable property. To sum it up, the plaintiff had no cause of action at all in respect of the relief or prayer aforesaid. The relief or prayer was prematurely sought.

[12] I must commend Mr White, Counsel for the Plaintiff who, in his supplementary heads of argument filed on the eve of the hearing, and during his oral submissions in court expressely did not pursue the relief of executability against defendants' immovable property. However, he insisted on the monetary judgment. It is prudent to mention that the plaintiff instituted a single claim comprising of relief

[2] Rule 46(1)(a) (1) of the Uniform Rules.
[3] See: Rule 46A (2) (ii) of the Uniform Rules.

relating to monetary judgment and executability of defendants' immovable property.

[13] This brings me to the provision of **Rule 46A (3) (d)** which provides that:

"3. *Every application to declare residential immovable property executable shall be-*

(d) served by the sheriff on the judgment debtor personally: provided that the court may order service in any other manner."

Personal service in matters of this mature is indispensable.

[14] The service of the summons was not entirely compliant with the aforesaid Rule as the first defendant was not personally served. The summons was served upon one Yolanda whose full and further particulars are unknown, in respect of the first defendant.

[15] The application in terms of **Rule 41(4) and 46A of the Uniform Rules,** which is an application to declare defendants' immovable property executable, was also not served personally upon the defendants. It was served upon G. Tyler, who is described in the return of service as the defendants' daughter.

[16] In the light of these shortcomings I find that an application to declare defendants' immovable property is ill-conceived and cannot be granted. It therefore cannot succeed. That leaves me with the monetary judgment which is part of a single claim issued under this case number.

[17] Whilst Mr White unequivocally conceded that the service of the papers offended **Rule 46A (3) of the Uniform Rules,** and is accordingly defective, but he strongly argued that the defect was cured by the presence of the first defendant in court. He steadfastly argued further that the fact that the first defendant's presence in court was in the context of the default judgment application was of no moment.

[18] In the context of summary judgment application, where the defendant had entered an appearance to defend, **Horn AJ**[4] had this to say: " *The Issue of summons is the initiation process of an action and has certain specific consequences, one of which is that it must be served. The methods of service are prescribed in the Rules. Mere knowledge of the issue of a summons is not service and a plaintiff is not relieved of his obligation to follow the prescribed Rules."* I emphatically find that the imperative dictates of **Rule 46A (3)** were not followed by the plaintiff.

[19] It is on the basis of the above authority that I am of a strong view that an application for default judgment for monetary judgment, which is part of the entire case including prayer for execution against immovable property cannot succeed. Both relief sought in the application must fail.

[20] Even if I am wrong on my reliance on this authority, there is yet another reason why default judgment cannot succeed.

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[4] See: ***First National Bank of South Africa Ltd v Schweizer Drankwinkel Pty Ltd*** 1998 (4)SA 565 at 568B.

[21] Provisions of **Rule 46A (3) of the Uniform Rules** are couched in imperative terms. The correct text is as follows:

*"3. Every application to declare residential immovable property executable **shall** be-*

(a)……

(b)….

(c)…..

*(d) Served by the sheriff on the judgment debtor **personally:** provided that the court may order service in any other manner."*

[22] The word "*shall"* when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.[5] In the wording of the subrule there is nothing that may be construed to negative a construction that provisions of **Rule 46A(3) (d)** are imperative and they require strict and exact compliance.

[23] The reason for this provision to be imperative is not far to fetch. **Rule 46A and Rule 46 of the Uniform Rule** deal with execution by the execution creditor against the residential immovable property of the judgment debtor. It creates an inroad to the provisions of **Section 26 of the Constitution,** which guarantees a right to "*everyone to adequate housing"*. The Rule-Maker envisaged that a judgment debtor may be left homeless once an execution against his or her immovable property is successfully effected.

[5] See: ***Bezuidenhout v AA Mutual Insurance Association Ltd*** 1978 (1) SA 703 (AD) at 709.

[24] The Rule also adversely affects children's rights enshrined in **Section 28 of the Constitution** which expressely provides as follows:

"28(1) Every child has the right-

(a)…

(b) to family care or parental care or appropriate alternative care when removed from the family environment.

(c) to basic nutrition, shelter, basic health care services and social services." Children have a right not to be placed at the degrading environment or placed at an environment that risks their well-being, education, physical or mental health or spiritual, moral or social development.[6]

[25] The Rule-Maker was well alive of the possible breakdown of family unit, loss of dignified shelter and the emotional and mental trauma that may be suffered when the family whose immovable property that is the primary residence executed against. The deterioration of social and educational development brought about by the change of the execution is a further consideration. Shelter is a guaranteed fundamental right for everyone.

[26] **Rule 46A and 46** of the Uniform Rules aim at limiting those fundamental rights[7]. The Rule-Maker intended to put a higher threshold for the execution creditors so that they do not lightly take away people's primary residence. The bar is raised deliberately so that

[6] **See: Section 28(1) (d), (f), (iii) of the Constitution**
[7] Section 36(1) of the Constitution.

judgment debtor's right to housing, dignity and privacy is not lightly tempered with. It is for that reason **Rule 46(1), 46A (2) of Uniform Rules and Section 36(1)(e) of the Constitution** require that for limitation of the rights outlined in **Section 26 and 28 of the Constitution** there must first be alternatives and other means that are exhausted before resorting to the execution on the immovable property. The Constitution expressely requires that there must be less restrictive means to achieve the purpose of limitation of rights.

[27] All of this accounts for the reason to couch the provisions of **Rule 46A (3)** in imperative terms. In what follows I briefly deal with the legal effects and consequences of the failure to adhere to imperative provisions of the law.

[28] There is sound judicial authority that a statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity.[8] The Service falling short of personal service of the application upon the defendants is a nullity, of no force and effect and consequently ineffectual.[9]

[29] Consequently the application for default judgment cannot succeed.

[30] In the result the following order shall issue:

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[8] ***Shalala v Klerksdorp Town Council and another*** 1969 (1) SA 582(T) at 587 A-C

[9] LAWSA, 2ND Edition, Part 25, Page 399, Para 366; also G.M Cockram: Interpretation of statutes, 3rd Edition. Page 163

30.1 The application for default judgment dated 22nd June 2021 is hereby dismissed.

30.2 That there shall be no order as to costs.

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ZONO AJ

ACTING JUDGE OF THE HIGH COURT

Date heard : 25th January 2024
Date Delivered: : 30th January 2024

APPEARANCES:

Counsel for the Plaintiff : Adv A. White

Instructed by :**VELILE TINTO & ASSOCIATES**
Tinto House
942 Disselboom Avenue
Wapadrand
E-mail:melandry@tintolaw.co.za
Tel:012 807 3366
Ref:S6599//M STRYDOM
C/O **MARK ROSSOUW ATTORNEYS**
193 Circular Drive
Fairview
Port Elizabeth
E-mail: mark@brlaw.co.za /
rene@brlaw.co.za
Tel:041 367 1314
Cell:072 786 4690
Ref: T0070

Defendants' Counsel : No Appearance
7 Hugenot Street
Van Der Stel
Port Elizabeth
E-mail: basilmtyler@gmail.com /
joantyler9@gmail.com
Tel: 082 8105 796